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NOTES.

The Naturalization of Children.

SECTION 14 of 'The Naturalization Act, 1870,' provides that 'nothing in this Act contained shall qualify an alien to be the owner of a British ship.' Did this reservation (as suggested L. Q. R. xii. 30) affect aliens only, or did it (as argued L. Q. R. xiii. 3) affect naturalized British subjects also?

The following argument presents itself:—

Every man is (if we except denizens who do not come into question) either an alien or a British subject.

A 'naturalized' British subject is, *ex vi termini*, a British subject. Therefore he is not an alien, and therefore he is not subject to the disabilities of an alien in respect of a British ship.

Moreover the Naturalization Act of 1870 confers for the first time on persons becoming naturalized British subjects a perfect British status embracing even the highest political franchises, and it seems hardly probable that the legislature whilst granting the supreme right of taking part in the government of the Empire should desire to retain a former residential fetter in connexion with the comparatively trifling privilege of owning a British ship. The novel provisions in the Act requiring residence or service under the British Crown for five years and intention to continue to reside or serve as conditions of naturalization might too be deemed a sufficient guarantee for residence if residence were regarded as a desirable factor.

The fact that section 14 of the Naturalization Act, 1870, has been thrown under the heading 'miscellaneous' is scarcely a feature in the discussion. Sections 3 and 4 are equally unscientifically placed, as Professor Cutler shows in his Law of Naturalization, p. 17, and

a similar remark applies to section 15. Professor Cutler clearly assumes that section 14 is confined to aliens proper, as does Sir W. R. Anson in his article on the 'Act of Settlement' in the Encyclopaedia of the Laws of England, p. 102.

The strongest point in favour of the opposite conclusion is that the Merchant Shipping Act of 1894, professing to be a mere consolidation Act, treats residence as still necessary in the case of naturalized persons. It may therefore be urged that this is tantamount to a declaratory enactment that the provisions of the Merchant Shipping Act of 1854 were not interfered with by the Naturalization Act of 1870. Giving every effect however to this argument, and making no point of possible inadvertence, the question is still open as to what decision would have been justly arrived at had the matter been the subject of litigation in the interval between 1870 and 1894.

THOMAS GREEN.

Whether any one but a cynic could, even in the last century, maintain that he had throughout life found 'his warmest welcome at an inn,' may be open to doubt. It is certain that Mrs. Lamond cannot re-echo Shenstone's sentiment. Her wish was to spend her life at the Hotel Metropole. She paid her way; there were plenty of rooms unoccupied, but, for all this, the manager would not suffer her to remain. She felt aggrieved, and naturally enough, like a high-spirited Englishwoman, acted, without knowing it, on the principles enforced in Ihering's Fight for Right, and brought an action for damages against the hotel-keepers. She has failed, however, in her efforts to establish her right to take her ease at her inn. First Mr. Justice Wright and then the Court of Appeal have determined that the claim to be received as a right at a common inn applies only to a traveller, and that a guest who has lodged at an hotel for nearly a year is, in effect, a lodger and not a traveller, and can on reasonable notice be required to quit. The decision in *Lamond* v. *Richard*, '97, 1 Q. B. 541, 66 L. J. Q. B. 315, C. A., is, we think, reasonable. It can hardly be maintained as a matter of law that a guest who has once been received at an hotel has a right, as long as he pays his way and does not misconduct himself, to remain there, it may be for life.

Yet *Lamond* v. *Richard*, though it may be well decided, raises one or two curious questions.

Is it, for example, certain that an innkeeper's lien upon the goods of his guest is not a right correlative to his duty to receive and entertain the guest? If Mrs. Lamond had become a mere lodger, it is not clear why the hotel-keeper should have any further rights

in respect of her goods than the rights possessed by the keeper of a lodging-house.

Is there, again, anything in the suggestion thrown out, rather needlessly, by Lord Esher, that the large London hotels do not hold themselves out as receiving customers according to the custom of England?

Is it possible, lastly, for any judge to affirm, as does the Master of the Rolls, that he 'will never submit, unless compelled by an Act of Parliament, to say that a thing shall be deemed to be that which it is not?' The maxim sounds reasonable enough, yet the necessity of submitting to legal fictions has been acquiesced in by judges as eminent as Lord Esher.

Persons anxious to ascertain the position and rights of servants of the Crown should read together *Gould* v. *Stuart*, '96, A. C. 575, *Dunn* v. *The Queen*, '96, 1 Q. B. 116, C. A., and *Dunn* v. *Macdonald*, '97, 1 Q. B. 555, 66 L. J. Q. B. 420, C. A. The result is this: servants of the Crown, civil no less than military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown and have no remedy for dismissal. There is, from a legal point of view, no ground to dispute the principle at which the Courts have in this matter arrived, and as things at present stand the law works beneficially. There is probably no one who will maintain that in practice the servants of the Crown are too easily dismissed. A capable head of a department will, if he speaks freely, generally admit that as far as the public service is concerned the only matter for complaint is the difficulty of getting rid, without excessive expense, of officials who are inefficient. But as already pointed out in the LAW QUARTERLY REVIEW, the doctrine that servants of the Crown hold office during pleasure only might, under conceivable circumstances, be so applied as to ruin the English civil service. The prerogatives of the Crown mean at the present time nothing but the power of party leaders, and it is well to bear in mind that there is little in the law of England, though there is much happily in the constitutional habits of Englishmen, to prevent tenure of office throughout the civil service coming to depend upon party changes. As far as legal restraints go it would be possible for an unscrupulous Premier to pay his followers, as to some extent does an American President, by distribution of the 'spoils' acquired by political victory.

Whoever watches with care the progress of judicial legislation will find constant proof of the determination of the Courts to give

full extraterritorial recognition to rights acquired in foreign countries. From this point of view it is well to read together *The Minna Craig &c. Co.* v. *The Chartered Mercantile Bank*, '97, 1 Q. B. 460, C. A. and *In re De Linden*, '97, 1 Ch. 453.

In the Minna Craig Steamship case, it is held by the Court of Appeal, affirming, as we anticipated, the judgment of Collins J. that a judgment *in rem* given by a German Court of competent jurisdiction is absolutely conclusive as to the ownership (or other *res*) to which the judgment applies, and that therefore the persons who have obtained such a judgment are entitled to hold the proceeds resulting from the sale of such ship free from any trust in favour of the creditors under an English liquidation or bankruptcy of the shipowner against whose ship the judgment was obtained.

The judgment of Stirling J. given in *re De Linden* recognizes the right of a German Court, which has under Bavarian law the guardianship of a lady of unsound mind, who together with her relations is domiciled in Bavaria, to receive payment of a fund standing in the High Court to the credit of the lady who is ward of the Bavarian Court.

The judgment follows *In re Brown*, '95, 2 Ch. 666, and trenches upon, if it does not absolutely invalidate, *In re Barlow's Will*, 36 Ch. D. 287. It gives to the guardian or curator of a foreign lunatic when judicially appointed under the law of the lunatic's domicil a full recognition which has hitherto hardly been conceded by our Courts. It is not too much to hope that we are approaching the time when any status acquired under the law of a person's foreign domicil will, as a rule, be completely recognized by English law.

The Germans have a proverb which runs, 'If each before his own door swept, the village would be clean'—a proverb no less allegorically than prosaically true. The law of England is only following up the same idea when it requires an owner of land to keep it from being a nuisance to the neighbours; but what if the neighbours are themselves the source of the nuisance—if you happen to be the owner of a piece of waste land in a densely populated district of London, and the denizens of the neighbourhood will uninvited shoot their rubbish there in pursuance of the ineradicable tendency of human nature to shift troublesome things on to other people? You try to act up to your common law duty. You put up a hoarding. They break it down. They throw things over. Is the landowner to be obliged to wage a perpetual war against dead cats and dogs, against stale fish and cabbage stalks? The Court of Appeal say, 'Yes' (*A.-G.* v. *Tod Heatley*, '97, 1 Ch. 560, 66 L. J. Ch. 275, C. A.). It is a fine example of

Rhadamanthine justice: all the more that the unfortunate landowner may have to expiate what is an indictable offence in durance vile, and not merely in damages. His best course seems to be to dedicate his land as a public recreation ground, and so in his turn shift his burden—his *damnosa haereditas*—on to others.

As illustrative of some of our methods, it is not uninstructive to note that the hoarding in this case was rated so high as to be rendered worthless for advertising purposes.

A debtor who knows that he is on the verge of bankruptcy has been guilty of certain breaches of trust. He thereupon conveys his property to a trustee for the benefit of the victims whom his fraud has injured. Two days later he is made bankrupt. The point is raised, on behalf of the bankrupt's creditors generally, that the deed of conveyance is a fraudulent preference and void. The Court of Appeal have held—*New, Prance & Garrard's Trustee* v. *Hunting*, '97, 2 Q. B. 19, affirming the decision of the Queen's Bench Division, '97, 1 Q. B. 607—that the contention is unfounded, and that the conveyance is valid. The decision follows good authorities, and especially *Ex parte Taylor* (1886), 18 Q. B. Div. 295. But to persons not versed in the bankruptcy law the result seems unsatisfactory, and raises some curious questions. Is a man acting rightly from a moral point of view who, having cheated *A* and being heavily indebted to *B*, gives his whole property to *A*, leaving nothing for the payment of *B*? This, it may be said, is a question for casuists, not for lawyers; but can the bankruptcy law favour or tolerate such a transaction as we have described? It would certainly seem to plain men that the debtor's conduct is at bottom nothing better than robbing Peter to pay Paul, and that it violates the system of equal distribution of a debtor's property among his creditors which the law of bankruptcy is intended to enforce; but if so, can the construction of the Bankruptcy Act, 1883, s. 48, which leads to an inequitable result, be sound? We confess that this is a point on which even the authority of the Court of Appeal does not silence all doubts.

'An Act of Parliament,' said Lord Holt, 'can do no wrong, but it can do things which look very odd,' and very odd indeed it would have been if the section of the Bankruptcy Act which makes voluntary settlements 'void' as against the trustee in bankruptcy of the settlor were construed to defeat the title of a bona fide purchaser for value acquired before the commencement of the bankruptcy. No one, if such were the case, could safely purchase from any person

holding under a voluntary conveyance, however solvent at the time, for not even of the wealthiest or the wisest can it be predicted with any certainty—witness the Glasgow Bank disaster or the Baring collapse—that the Bankruptcy Court will not in the course of a few years open its doors to them. In *Carter and Kenderdine's Contracts*, '97, 1 Ch. 776, 66 L. J. Ch. 408, C. A., Rigby L.J. seems best to have interpreted the mind of the legislature when he said that what the section meant was that the voluntary settlement was not to stand in the trustee's way—that that *alone* was not to exclude him from laying his hand on the property comprised in it. The bona fide purchaser for value who has got the legal estate is the immemorial favourite no less of English common law than equity, and there is the best reason why his title should be 'respeckit,' for if it were not, all commercial dealings would be rendered unsafe. Even after bankruptcy a person dealing with the undischarged bankrupt in regard to his after-acquired property at any time before the trustee has intervened to claim it gets a good title, though the words of the Bankruptcy Act vest such after-acquired property in the trustee. The fact is that all statutes, bankruptcy or other, must be read with a tacit recognition of those principles of common law or equity which are the very foundation of the statutory superstructure.

The husband has for a long time past been suffering divestiture, legislative and judicial, of his common law rights—the last shred of marital authority went with the *Jackson* case—and now the father is undergoing the same process. The Guardianship of Infants Act, 1886, is as Lindley L.J. sympathetically put it 'a mother's Act' (*In re A. & B., Infants*, '97, 1 Ch. 786, C. A.): 'the mother pervades it,' said Lopes L.J.; in fact we have at last—after a dozen centuries—reached a point at which the Court can exercise a rational discretion as to the best thing for a child, unembarrassed by any survivals from a dead past. A father's parental duties still remain—he cannot abdicate them, but his rights are now entirely subject to the control of the Court; and it requires all a Court's wisdom and experience—a maternal as well as paternal solicitude—in these custody cases to solve the problem of the child's welfare: to give the due consideration to each circumstance—to the conduct of each of the parents, their wishes, their means, most of all to securing that the children shall be brought up in their tender years on terms of affection with one another and with their parents. One other satisfactory thing emerges from the judgments of the Lord Justices in *In re A. & B., Infants*, and it is this, that no misconduct by a mother can ever be an absolute bar to her being given the custody

of her child. The love of the mother need not be quenched by the guilt of the wife.

Re Williams, '97, 2 Ch. 12, C. A., shows that the troublesome question of 'precatory trust' cannot be prevented from arising, or even from dividing judicial opinions, so long as testators insist on framing their wills in slovenly and ambiguous language and inserting unnecessary matter in them. If a man wants to create a trust, let him do so in the unmistakable terms well known to the law. If not, let him express his private wishes in a separate letter or memorandum not executed as a testamentary instrument, or at least, if he must put them in the body of the will, add words declaring that he does not intend to create a binding trust. It may be said that, inasmuch as all such cases are cases of particular construction, it is useless to report them when they do not clearly lay down any general principle. But a case which, like this one, divides the Court of Appeal, is instructive though not decisive: and moreover the reporting of some such cases from time to time is useful and necessary as a warning to persons, learned or otherwise, who prepare wills.

Can an act constitute an actionable wrong which, though tortious by the law of England, and not strictly justifiable under the law of the country, e.g. Brazil, where it has been done, yet is not there actionable?

This is an inquiry which writers on the conflict of laws and very eminent judges have purposely left open. It has now received a distinctly affirmative answer from the Court of Appeal in *Machado* v. *Fontes*, W. N. 1897, 56 (5). In that case *A* brought an action against *X* for an alleged libel published in Brazil. The defence which it was proposed to raise on behalf of the defendant was that the alleged libel was not actionable under the law of Brazil, and therefore would not support an action in England. It has been held by the Court of Appeal that such a defence is one which under the old system of pleading would have been termed demurrable, or, in other words, that an action may be maintained in England in respect of an act done, e.g. in Brazil, which, under Brazilian law, though not innocent or justifiable, would not there support an action for damages. The decision is sensible, and is supported by the high authority of Willes and Blackburn JJ. It is opposed, however, to the views of other eminent lawyers: there is, moreover, a difficulty in seeing how the decision of the Court of Appeal is to be logically justified. The fundamental principle of private international law is that rights duly acquired under the law of any country ought to

receive recognition in every other civilized country, but in the case we are dealing with the plaintiff has acquired no right of action for damages under the law of Brazil, and it is certainly an anomaly that *A* should, in respect of acts done in Brazil, acquire rights in England not given him by the law of Brazil. To put the same thing in other words, it is hard to see why either a Brazilian or an Englishman who publishes in Brazil false statements of another, but does not thereby incur under the law of Brazil liability to the payment of damages, should be liable to pay them when an action is brought against him in England. Brazilian law does not impose such a liability, and English law does not extend to Brazil. Such a case may be within the old rules as to 'transitory' causes of action, but can hardly have been contemplated when those rules were settled.

X enters into a wagering contract with *N* under which *X* and *N* are each to deposit £500 with a stakeholder to abide the event. *A* at *X*'s request advances the £500 to *X*, who pays it to the stakeholder. It is agreed between *X* and *A* that if *X* wins the bet and receives the stakes, which amount, owing to the addition of money by other persons, to £1,400, that *X* shall repay to *A* the loan of £500. *X* wins the bet and receives the stakes. He refuses to repay *A* the £500. *A* brings an action for it and the Court of Appeal have held that *A* is not entitled to recover his money. This is the effect of *Carney* v. *Plimmer*, '97, 1 Q. B. 634, 66 L. J. Q. B. 415, C. A. The decision clearly enables a rogue to retain money to which he had no more moral right than a pickpocket has to a watch which he has stolen; but *Carney* v. *Plimmer* is, for all this, well decided. It gives to the Gaming Act, 1892, its full and legitimate effect. Half the difficulties which encompass the law of wagers would have been got rid of if the Courts had construed the Gaming Act, 1845, as honestly as the Courts are now construing the Gaming Act, 1892.

No case contained in the Law Reports has excited more popular attention than *Hawke* v. *Dunn*, '97, 1 Q. B. 579, 66 L. J. Q. B. 364. It interests every man who either likes or dislikes the practice of betting at races. Yet from a legal point of view it merely decides a very narrow point, viz. that Tattersall's ring, situate upon the Hurst Park racecourse, is a 'place,' and was also a place used by a given bookmaker, the respondent, for the purpose of 'betting with persons resorting thereto,' and hence, that the respondent was liable to a penalty under the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 3. The oddity of the thing is, that no one of the points

determined by *Hawke* v. *Dunn* would appear to be, as a matter of mere legal logic, disputable; yet the judgment in the case has apparently come upon the betting world as something paradoxical and startling. The explanation of this is twofold. The Courts have found it peculiarly difficult to determine what is meant by a 'place,' and the public find it difficult, not perhaps without reason, to believe that since 1853, that is to say, for forty years and more, a course of action has been illegal which is all but essential to professional betting on horse races. *Hawke* v. *Dunn* will probably force upon Parliament the question what ought to be the whole attitude of the legislature towards betting at public races. Meanwhile the same point stands, at the date of our going to press, for judgment in the Court of Appeal.

Goldstein v. *Vaughan*, '97, 1 Q. B. 549, 66 L. J. Q. B. 380, in effect determines that the occupier of a workshop wherein young persons and women of the Jewish religion are employed on Sunday and who keeps the shop open for his customers for the purpose of enabling them to send or fetch away clothes mended or to be mended in pursuance of previously made contracts, does not thereby keep the shop 'open for traffic,' and therefore as a result of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), ss. 21, 51, does not incur any penalty in respect of work done on Sunday.

No doubt the interpretation put by the Queen's Bench Division on the words 'open for traffic' is a somewhat narrow one, but, on the other hand, the object of s. 51 being to exempt Jewish members of the community, or rather those who employ such Jewish members, from penalties in respect of work done in a workshop on Sunday, the words limiting this exemption ought to receive a narrow construction, and it can hardly be said that to take away goods one has left on deposit is in itself to do an act of traffic.

Duncan v. *Dowding*, '97, 1 Q. B. 5756, 6 L. J. Q. B. 362, in substance decides that where a constable is empowered to enter licensed premises for the purpose of enforcing the provisions of the Licensing Acts, he has no right to do so unless he has reasonable ground to suspect that some violation of the Acts is taking place, or is likely to take place on the premises. The decision is right if the principle generally adhered to by English Courts in construing enactments giving powers to the police or other officials is sound, viz. that any Act which limits the ordinary rights of individuals should be strictly construed so as to extend official authority to the very least extent which is compatible with the words of the Act. But is this

restrictive system of interpretation really sound? It is at least maintainable that the Courts ought to consider fully as much the interest of the public as the rights of individuals. The aim, for example, of the Licensing Act, 1874, s. 16, is to protect the public by enabling the police easily to detect violations of the licensing laws, and the natural interpretation of the section is that a constable may at any time enter licensed premises if he does so bona fide for the purpose of detecting violation of the law. The Courts have now, in fact, added to the requirement of a bona fide intention to enforce the law the further condition that the constable must have reasonable ground for suspecting that the law is or will be broken. Whether this be a wise piece of judicial legislation is open to grave question. The whole policy of the Licensing Acts may be wrong, but with this the Courts have no concern. Their duty is to carry out to the utmost the intention of the legislature, and it is difficult for the ordinary man to believe that the judgment in *Duncan* v. *Dowding* does not cut down the powers which Parliament, whether wisely or not, intended to confer upon constables.

Millions of money are now invested in licensed property, and it need hardly be said that it is the licence which gives the value to such property. It is the licence therefore about which a purchaser is solicitous. If he does not get the licence he is as badly off as the recent Brinsmead Company when it bought a trade name which it could not use. But this does not entitle him—apart from special stipulations—to require what is in effect a warranty by his vendor that the licence will be transferred at the next Licensing Sessions, nor even that the vendor will obtain interim protection for the purchaser until such Licensing Sessions (*Tadcaster Brewery Co.* v. *Wilson*, '97, 1 Ch. 705, 66 L. J. Ch. 402). The vendor in such case says, 'You know the nature of licensed property—that the full advantage of it cannot be assigned without further steps which are not within my control. Here is my licence—a valid and clean licence, and I am ready to do anything to enable you to get a transfer.' Can the vendor be expected to do more? Certainly not. The purchaser takes his risk of renewal at the Sessions. He takes what the vendor has to sell—for better or worse. The analogous case of the sale of shares furnishes a good illustration. The seller agrees to transfer all his title to the shares and the indicia of his title, but he does not warrant that the company will register the transfer. That is a matter over which he has no control. If the buyer wants more he must stipulate for a sale 'with registration guaranteed.'

Bankers receive in good faith and without negligence payment for a customer of a crossed cheque to which he has no title. Part of the money paid is applied to satisfy an overdraft of the customers on the bank. The bankers are, nevertheless, protected from liability under the Bills of Exchange Act, 1882, s. 82. This is the effect of *Clarke* v. *London & County Banking Co.*, '97, 1 Q. B. 552, 66 L. J. Q. B. 354. Assuming that the policy of protecting bankers, who under the circumstances collect money for a customer, be sound, the case appears to be rightly decided. No one really gains by the Court's frittering away through subtle distinctions the broad effect of a statutory enactment.

The ubiquity of the demon builder and his inveterate habit of crowding any number of new houses on the smallest plot of land gives a special value to the decision in *Broomfield* v. *Williams* ('97, 1 Ch. 602, 66 L. J. Ch. 305, C. A.). Not that that decision enunciates any new principle, it merely reiterates the time-honoured maxim of the common law that a grantor cannot derogate from his grant. But there are what may be called legal barnacles, and these barnacles are constantly adhering to time-honoured maxims, and have to be scraped off from time to time by judicious judges. The barnacles in *Broomfield* v. *Williams* were *Birmingham Banking Co.* v. *Ross* and *Myers* v. *Catterson*, both decisions on very special circumstances. Otherwise the case resolved itself into this. A man buys a house, a notice-board on the adjacent land informing him that the land is building land belonging to his vendor. Is he to be taken, by reason of such notice, to waive his right to light—light, the world's primal blessing? The inference would be most unwarrantable. 'I knew,' the grantee would say, 'that the land was building land, but it is quite consistent with that that I shall enjoy the benefit of light and amenity of prospect which the grant gives me.' Where is the intention to waive which could raise an estoppel?

Why was that 'blessed' statute of Elizabeth ever repealed which required every house built to have an acre of land attached to it?

The Judicial Trustees Act, 1896, is the latest of a series of Acts designed to mitigate the lot of trustees. The ideal trustee—the prudent man of business—is still on his pedestal in the equity courts, still pointed to for imitation and admiration, but the legislature, recognizing his impossible perfections, has tried to frame a less exacting ideal. Hitherto the statutory relief has taken the form of defining states of circumstances or laying down rules of administration: which can never prevent hardship. The Judicial Trustees Act adopts a new method by investing the Court with

a discretionary jurisdiction to 'excuse' the trustee when he has acted honestly and reasonably. What *In re Turner, Barker* v. *Ivimey*, '97, 1 Ch. 536, 66 L. J. Ch. 282, brings into relief is that honesty alone will not avail a trustee. He must act reasonably as well as honestly, and here one foresees trouble in this comfortable Act for trustees: because that word, 'reasonably' interpreted by the exalted intelligence of the Court, connotes an alarming amount of shrewdness, caution, and foresight. Still it would not be safe to eliminate intelligence altogether from the necessary qualifications of a trustee: only let the intelligence ascribed be fallible, human, frail.

An auctioneer's authority to sign the contract on behalf of the purchaser is derived from the purchaser's bid or nod. This is the theory of law. The authority springs from the necessities of the case, and those necessities are the measure of it. A nod may mean a great deal, like Lord Burleigh's shake of the head, or Tilburina's start, but the plaintiff in *Bell* v. *Balls* ('97, 1 Ch. 663, 66 L. J. Ch. 397) was for making it too pregnant with significance. According to him it meant, 'You or your clerk may sign the contract for me, and you may do so at any time within three months.' The Court declined to accept this free rendering or paraphrase of the nod. There is no necessity for it either, because an auctioneer is not so busy that he cannot himself indorse the contract and conditions with the name of the purchaser, and that is on the authorities sufficient. The policy of the Statute of Frauds was and is to prevent certain important classes of contracts—including the sale of land—resting on the frail testimony of memory, and such is the fallibility of human memory that a lapse of three months might well defeat the policy of the statute. Contemporaneousness in the note or memorandum is the only safe and sufficient rule, as Lord Erskine long ago held.

The first article of faith with a doctor ought to be, and happily is, not to divulge his patients' secrets. The law, strange to say, while it accords privilege to the solicitor in respect of all professional communications made to him by his client, recognizes no such privilege for the equally confidential relations of priest and devotee, of doctor and patient. Yet the secrets of the confessional and the consulting-room are the more sacred. A recent Scottish case illustrates the price a doctor may have to pay for being loyal to professional honour—for it is more than etiquette. The doctor was insured under an accident policy against blood poisoning. In attending a lady patient suffering from syphilis he scratched his finger and brought on blood poisoning. The insurance company insisted on having the lady's name. The doctor refused it. The

Court sympathized with his scruples, but it could only take the prosaic view that the doctor had not adduced that best evidence which the law requires in support of his claim (*A. B.* v. *The Northern Accident Insurance Co.*, 2 Ct. Sess. Cas. 258). 'Il faut souffrir pour être belle,' as the French say, and you must also suffer at times for being honourable, but insurance companies which conduct their business on these principles will probably not be popular in future with medical men.

In *Wilkinson* v. *Downton*, '97, 2 Q. B. 57, Wright J. had to deal with a curious question of damage caused by 'nervous shock.' The defendant falsely and wantonly told the plaintiff that her husband had met with a serious accident. The plaintiff, besides incurring some small expense on the faith of this story, 'became seriously ill from a shock to her nervous system.' Held that the defendant, having 'wilfully done an act calculated to cause physical harm to the plaintiff,' was liable for the consequences which he ought to have foreseen as possible. 'It is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.' And, notwithstanding the decision of the Judicial Committee in *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Ca. 222, and its recent adoption by the Court of Appeals of New York (see note at p. 60 of the principal case), there seems to be no good reason for holding such damage to be too remote. While we wholly agree with Wright J. on principle, it must be admitted that as the authorities, including this decision, now stand, the question cannot be regarded as settled either here or in America.

The life interest of a domiciled Englishman under a trust by will is determinable on bankruptcy. He is made bankrupt in New Zealand after the death of the testator, but he is then resident in New South Wales and has never lost his English domicil. Is his life interest determined by the bankruptcy? This is the question which came before Mr. Justice Kekewich in *Re Hayward*, '97, 1 Ch. 905. The answer to it, according to the view taken of the matter by the learned judge, depends on the reply to the further inquiry whether the bankruptcy law of a foreign country where a bankrupt is not domiciled has extraterritorial operation? To this inquiry his lordship, following *In re Blithman* (1866), L. R. 2 Eq. 23, has given a negative answer, and though *In re Blithman* is not consistent with *In re Davidson's Trusts* (1873), L. R. 15 Eq. 383, which has been quite recently followed by *In re Lawson's Trusts*, '96, 1 Ch. 175, it is probable that *In re Hayward* is rightly decided. It

tends at any rate to establish the general rule that the extra-territorial effect of a bankruptcy depends on the domicil of the bankrupt.

The June number of the *New Century Review* contains a symposium after the old *Nineteenth Century* fashion by several distinguished contributors on the codification of English law. We cannot agree with Mr. Blake Odgers and Mr. Courtney Kenny in desiring to see authoritative digests undertaken, for the short reason (given long ago by the late Mr. Justice Willes) that a code is not more troublesome to make than a digest, and will be much more useful when made. We agree with Sir Courtenay Ilbert that an improved system of legal education is one of the first conditions for any serious advance in this matter, and with Sir Roland Wilson that the establishment in some form of a real Ministry of Justice is another. The form we should prefer, however, would be the addition to the Lord Chancellor's staff of a high permanent official corresponding to the permanent under-secretaries of the other great departments. To make the Lord Chancellor independent of party politics might be best of all, if it could be hoped for. Meanwhile, as Sir Courtenay Ilbert points out, we should not underrate the improvements already effected and in progress.

The Arbitration Treaty with the United States has perished in its birth from an annoying complication of political accidents. The misfortune ought to shake certain people in their touching belief that nothing but a nicely written out scheme of an international tribunal is needed to abolish wars and armaments; but as they are mostly the same people who clamour for a general European war when they cannot have exactly their own way in a matter on which they feel strongly, we doubt whether they will learn any more from present than they have done from past history. The much abused Concert of the Powers is after all a serious endeavour for peace, and there is no real reason to doubt its good faith. Meanwhile right-thinking Britons and Americans may console themselves with Captain Mahan's admirable Life of Nelson, which we would not barter for a ship-load of treaties.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

COLLISIONS AT SEA WHERE BOTH SHIPS ARE IN FAULT: A REPLY [1].

VARIOUS adverse criticisms have been passed upon the proportional rule, and they will here be answered. So far as possible the letter or newspaper article containing these criticisms is quoted.

Criticism 1. '*It is impossible to make an accurate apportionment.* This is perhaps the commonest objection.

'But I don't think you meet the pinch of the case against you, which is that the proportions of blame cannot be calculated. You speak (p. 14) of cases in which the calculation is simple and obvious. I venture to say that you do not even mention a case in which it is even possible in any accurate sense. You at best can make a rather fairer *judicium rusticorum*.'

'I note that the attempts at "proportion" are confined to a few simple fractions; which seems to me wise, and I dare say the system results in a nearer approximation to justice than ours does [2].'

'But the great difficulty will always be to make the apportionment equitably, seeing that so many considerations and often intricate points have to be taken into account. A judge must be almost more than human to be able to adjust the precise percentage of liability attaching to each vessel in a collision where both vessels are to blame [3].'

The above quotations practically answer themselves—'a rather fairer *judicium rusticorum*' and 'a few simple fractions' are the whole object of the rule. But there are at least four good answers to the objection.

(*a*) *Rule is discretional.* The essence of the rule is that the apportionment, instead of being arbitrarily fixed as in our rule of halved damages, is left, without any reservation whatever, to the pure discretion of the Court, which, with the assistance of its nautical assessors, will form its own opinion of the gravity of the

[1] See articles by Louis Franck, LAW QUARTERLY REVIEW, vol. xii. p. 260, and by Leslie F. Scott, p. 17 above.

[2] From the same writer, after reading the article by M. Louis Franck in LAW QUARTERLY REVIEW, vol. xii. p. 260, which gives a number of Belgian instances of the actual working of the rule.

[3] *Fairplay*, February 18, 1897.

faults committed by each ship, and will apportion the damages accordingly. And it is to be borne in mind that division by halves is an apportionment within the meaning of the rule, just as much as into three-fourths and one-fourth or any other proportions; and as in many cases there will be little to choose in respect of blame between each ship, the Court will in many cases—perhaps in most—as heretofore, apportion the damage by halves.

(*b*) *Unequal apportionment only made where blame obviously unequal.* Other proportions than halves will never be adopted unless the difference of blame is obvious and beyond all reasonable doubt; in fact, not unless a judgment that both are equally to blame would be manifestly unfair. It is just in cases where a collision has been clearly brought about very much more by one vessel than the other, that it is both simple and just to make the one pay more than the other. And, further, it is just in cases where the common-sense man of practical experience—the ordinary shipowner—sees a difference of blame, that the possibility of apportioning the damages in some other fractions than halves—say one-third to two-thirds, or one-fourth to three-fourths—will allow the Courts to bring their decision into line with the common-sense view.

(*c*) *No nice calculation attempted.* The complaint that no 'adjustment of the precise percentage of blame is possible' begs the question by an unwarranted assumption that such a precise adjustment is the object of the rule. *De minimis non curat lex*: and the Court will not concern itself with small quantitative distinctions any more under the proportional than under any other rule of procedure. It cannot be too much insisted on that the purpose of the rule is to deal with important differences, and with important differences alone: if one ship is much more in fault than the other, then an uneven apportionment will be made; but where the difference of fault is either small or doubtful, there the apportionment will continue to be by halves.

(*d*) *No harder than many other things done by judges.* Such a comparison of the faults of each ship—a comparison where only broad distinctions are looked for and no nice calculation attempted—cannot be a task of such unusual difficulty. But suppose that it were difficult; for all that 'it is no harder than a thousand other things a judge has to do every day'—and the preceding are the very words recently used by a judge of the High Court in expressing his approval of the rule.

The supporters of the rule require one postulate only to be granted—that judges will use wisely the discretion entrusted to them.

Criticism 2. '*Impossible except under Franco-Belgian and similar*

procedure.' Some found objections upon the difference between English and Franco-Belgian procedure. What the objections are it is difficult to know precisely; but the criticism in one form or another amounts to a contention that *if the proportional rule is capable of application in practice, it can only be applied by following the Franco-Belgian procedure.* Others go further, and contend not only that it is impossible to apply the rule under any procedure other than the Franco-Belgian, but that even under Franco-Belgian procedure the application of the rule leads to an absurdity. One letter received was as follows:—

'My hesitation about the matter is due to my half knowledge of the way the Continental Courts based on the Civil Code work. I fancy they leave the whole matter to experts, who tot up the faults thus: "bad look-out" 1, "not whistling" 2, &c., which seems to me unsatisfactory and capable of absurd results. You cannot apply a quantitative analysis.'

Whatever the exact bearing of this criticism, a short account of the Franco-Belgian procedure is the best answer, and for this I am indebted to M. Louis Franck of Antwerp.

'Neither Belgian nor French law contains any special provision as to the procedure to be followed in collision actions. Once the action is regularly commenced, which involves—(*a*) in Belgium, a protest within twenty-four hours, and action brought within the month (*Art.* 232, 233, *Loi* 21 *août* 1879); (*b*) in France, an action brought within the year (*Art.* 435, *Loi* 24 *mars* 1891), the proof of the facts must follow the rules of the common law. The judge may accordingly rely either upon documentary evidence—such as the marine reports (*rapports de mer*)[1], the log-books, the inquiries made by the pilotage authorities (*enquêtes de l'administration du pilotage*), the report by experts upon the damage (*expertise*), &c.—or upon the oral evidence of witnesses called before him.'

'None the less, the practice at Antwerp is to hold an expert inquiry (*expertise*) not only upon the damage, but upon the cause of the accident. This expert inquiry is a kind of preliminary hearing of the case (*instruction préparatoire*). The experts are usually three in number. They are retired captains of long experience and marine engineers. They are usually chosen from amongst certain men, of whom a list is drawn up by the Court, and who form the Nautical Committee (*Commission Nautique*) of the Tribunal of Commerce at Antwerp, but have no official position. They are men of character and ability, and give general satisfaction. The following is the procedure before them:—

[1] *Rapports de mer* are reports made by the captain: an 'official log' in the form of a narrative account with explanation of accidents, &c. (*Art.* 32, *Loi de* 21 *août* 1879.)

'They summon the parties and their legal and technical advisers to all their proceedings, which then cease to be *ex parte* (*qui sont donc contradictoires*). These proceedings fall into two parts: (1) an examination, a description and assessment of the damage; (2) a non-official inquiry, at which the captains, officers, crews, and other witnesses (if any) are examined in the presence of the parties and their advisers. This examination is done thoroughly, and the parties interested put any questions they think fit. The experts in their report to the Tribunal state the results of this inquiry. But they add an exact description of the place of collision, a summary of weather, tide, and current, and finally their own technical remarks, which they make in virtue of their expert knowledge, upon the depositions. When, by the terms of the order appointing them, they are called so to do, they give their conclusions in such terms as the following. "We are of opinion that the collision was due to the fault of ship *A* for not having kept out of the way of ship *B*, which it had on its starboard side under the circumstances mentioned;" or again, "We are of opinion that the accident was due to the fact that the plaintiffs' ship chose to anchor in a spot where her presence was a grave danger to navigation; and, in the second place, to bad look-out on the part of the defendants' ship." These conclusions are based upon the facts stated in the report. I have never known the experts to make an apportionment of the damages, and I do not think the Tribunal would hold itself in any way bound by such apportionment.

'The report being thus made is read to the parties, who are free to make any observations, or to require from the experts further information.

'The next step is to file (*déposer*) the report, and then begins the discussion before the Tribunal. The Court is in no way bound to follow the opinion of the experts. It is by no means the rule that it should so follow it. Its discretion is absolute, and it often avails itself of such discretion to form an independent opinion. I could cite many important cases, decided in recent years, in which the judgment of the Court has differed from the conclusions of the experts. There is nothing to prevent the Court from ordering the examination of witnesses before it.

'In France the procedure followed varies according to the port and special circumstances. There is regularly a report by experts made by order of the judge, in order to ascertain the damage; often the experts are called to give their opinion upon the circumstances and causes of the collision. But I think their importance is much less than in the Antwerp procedure. The French Tribunals, on the other hand, attach a great importance to the marine reports

(*rapports de mer*) and to the log-books. They also order inquiries to be conducted before them.

'In all this procedure I see nothing to render the application of the proportional rule either more or less easy. I admit readily that it is easier to form an opinion upon a reasoned report; but this facility belongs to the whole work of the judge and not only to the last stage of it, which is the comparison of the faults for the purpose of deciding the apportionment of the damages.'

The above account and comments by M. Franck are, it is submitted, sufficient answer to the criticisms above mentioned. (1) The Court, and not the experts, makes the apportionment. (2) There is nothing in the work done by the experts, or in any other particular of the Belgian or French procedure, which can make the duty of apportionment easier of performance to the Belgian or French judge than it is to the English judge under English procedure. The experts perform the work, as it were, of a special jury and of nautical assessors combined; upon their report the Court (with power to reconsider the report if it thinks fit) forms its judgment. In England the nautical assessors sit with the judge. Surely there is no material difference?

But a further point should be borne in mind. In England all cases of collision above the County Court limit go before one and the same Court—namely the Admiralty Court; but abroad each case of collision is heard by the Tribunal de Commerce of the port where proceedings are taken. Our Admiralty Court has necessarily great experience; but it is not possible that each one of the numerous Tribunaux de Commerce, trying, as they do, not only admiralty, but all kinds of commercial work, should have anything like the same experience of any special work such as collision cases.

Criticism 3. The last hostile criticism to be dealt with is as follows:—'*If the English rule of halved damages works injustice, the cause is rather the statutory presumption of fault than the rule itself.*'

This reply seems at first sight to contain an argument of some force, but further consideration shows that its apparent force is really due to a fallacy of confusion—either that of an ambiguous term, or that of an irrelevant conclusion. The ambiguous term is the word 'injustice'; and the irrelevant conclusion consists in using the word 'injustice' in a different sense to that in which the advocates of the proportional rule use it when they contend that the rule of halved damages causes 'injustice.'

The word 'justice' has, in its legal use, two meanings. Criminal or administrative justice is one; civil or distributive justice is the other. If *A* does an act which the law forbids as an offence against the public, it is 'just' that he should be punished; and if that

punishment is disproportionate to his offence, it is 'unjust'—there is a failure of administrative justice. If *A* does an act which affects another individual *B* in a way which the law regards as an infringement of *B*'s rights, it is 'just' that *A* should make reparation to *B*; and if the reparation made by *A* be disproportionate to the damage caused by *A*, it is 'unjust'—there is a failure of distributive justice.

The advocates of the proportional rule contend that the rule of halved damages causes 'injustice' in the distributive sense; but the opponent whose criticism is quoted above replies with a proposition which is only true if the word 'injustice' is used in its administrative sense. Herein lies the *ignoratio elenchi*.

In order to demonstrate the fallacy it is necessary to see how the law of collision is concerned with 'justice' in both its senses. That distributive justice enters in, no one will dispute. A collision is a tort, and involves the infringement of *A*'s rights by *B*, or *B*'s rights by *A*, or both. But that administrative justice also enters in, is not, in English law, obvious at first sight; but a consideration of Belgian law will show that this is so.

The Belgian law of collision keeps entirely distinct the two spheres of administrative and distributive justice (*ce qui est de police maritime et ce qui est de droit privé*). From the point of view of administrative justice, the captain of the ship incurs liability the moment a breach is committed of any of the Regulations for Prevention of Collisions at Sea; and the liability attaches solely by reason of the breach, because the act is contrary to the words of the Regulations. It is therefore a penal offence (*contravention*), and renders the offender liable to a penalty. From the point of view of distributive justice a breach of the Regulations involves civil liability only if the breach has actually caused the collision.

In English law the presence of the two principles of justice is not plain, because the conduct which causes the collision does not come within reach of the criminal law unless it amounts to a crime. A breach of the Regulations is not nominally a penal offence. But a breach of the Regulations is rendered in effect a penal offence, and made subject to a penalty, by the operation of the statutory presumption of fault: and accordingly a breach is really, though not nominally, within the field of administrative justice just as much in English law, which does not call it an offence, as in Belgian law, which does call it an offence; and just as much as numerous offences under the Merchant Shipping Act, such as overloading. The statutory presumption of fault, as it now is, was introduced by 36 & 37 Vict. c. 85, s. 17, now the Merchant Shipping Act, 1894, s. 419, ss. 4, which runs as follows:—

'Where in a case of collision it is proved to the Court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.'

It was introduced in the year 1873 in order to enforce strict obedience to the Regulations, which were at that time being disregarded, particularly by sailing ships. Its effect as interpreted in the *Fanny M. Carvill*, 2 Asp. M. L. C. 565, and the *Duke of Buccleugh*, '91, A. C. 310, is that the ship which infringes a regulation is in fault, unless the infringement was either (*a*) necessary (i. e. unless obedience to the Regulations would have caused greater risk of collision than departure from them) or (*b*) *could* not have in any respect caused or contributed to the collision. In fact the statutory presumption is a police regulation for the control of traffic on the high seas; in principle it creates an offence and imposes a penalty, although the penalty is paid as damages to the other party and not as a fine to the State.

Thus it is that the 'presumption causes injustice'; the penalty of damages follows a hard and fast rule, and the Court has no control over its amount and cannot apportion it to the gravity of the offence. Where one ship is the sole cause of the collision, the administrative injustice (which may theoretically exist) is merged in the distributive justice, which demands payment by the ship, which has caused the collision, of the whole damages. But if a collision is in fact caused *solely* by inevitable accident (by some act of God, or the conduct of a third ship), and yet one ship has committed a breach of the Regulations and is therefore (although not in fact a cause of the accident) held solely to blame, then the statutory presumption causes injustice in the administrative sense, because the offence of breaking the Regulations is visited with a penalty of damages out of all proportion to its gravity, in view of the fact that the breach had no part in causing the collision. Or again, where both ships are held in fault, but *A* has in fact been the sole cause of the collision, and *B* has only committed a technical breach of the Regulations (which, *ex hypothesi*, has in no way contributed to the collision), then, since *B* must pay half the damages, there is again, and for the same reasons as in the last case, a failure of administrative justice: common sense regards as unjust a penalty so disproportionate to the offence [1].

[1] Cp. *The Arratoon Apcar*, 15 App. Cas., at p. 41, per Lord Macnaghten. 'The error on the part of the *Arratoon Apcar* may seem venial compared with the misconduct of those on board the *Hebe*. But their lordships have no power to absolve a vessel

Thus it is true, as the opponent above quoted says, that 'the statutory presumption is the cause of the injustice;' but it is true in the limited sense of administrative injustice alone, and not of distributive injustice also. The distributive injustice arises only where ship *A* has to pay more (or less) of the damage done to ship *B* than ship *A* has actually *caused*; cause and effect being judged by the principle of Belgian law, which holds a ship in fault for breach of the Regulations only when that breach is one of the various circumstances which together constitute the actual 'cause' of the collision. And that which causes the distributive injustice is not the statutory presumption—which is a mere rule of administrative justice (*police maritime*), and has nothing to do with distributive justice (*droit privé*)—but the rule of halving the damages. Therefore the proposition that 'the statutory presumption causes the injustice,' when used as a reply to the contention that 'the rule of halved damages causes injustice,' involves a fallacy; because in the latter the word 'injustice' means '*distributive*' injustice, but in the former it means '*administrative*' injustice.

But not the least merit in the proportional rule is that it will enable the Court, in cases where, under the rule of halved damages, the statutory presumption would, for the above reasons, result unjustly, to minimize the injustice by adjusting the apportionment accordingly. Any portion of the damages would be a sufficient penalty to ensure that observance of the Regulations which the statutory presumption is intended to enforce. The statutory presumption serves its purpose of a police regulation well enough, and there is no reason why it should be abolished. Whatever injustice it does cause can be obviated in a large measure by abolishing the rule of halved damages, which now takes the penalty out of the control of the Court.

The general answer to all minor objections is that in maritime affairs the end most important to attain is the approximation of the maritime laws of the various countries. And it may well be borne in mind by Englishmen that such approximation will lead in a large measure to the universal adoption of English laws.

The lead in the reform has been taken by Germany, which hitherto has, in cases where both ships are in fault, maintained the rule which used to obtain at common law in England, of leaving the loss where it falls and allowing neither ship to recover

which infringes the Regulations for the Prevention of Collisions at Sea from the consequences prescribed by statute unless a plea of necessity is made out.' Notice the language of administrative justice here used.

anything. After resolutions in favour of the proportional rule passed by the *International Association of Insurers of Carriage Risks* in September, 1896 (where sixty-three insurance companies from all over Europe were represented), and by shipowners' associations in Hamburg and Berlin, the Ministry of Justice had a bill drawn up to effect the reform. This bill has now been placed upon the Statute-book, and the proportional rule which had already been incorporated in the last Civil Code in Germany, will, from Jan. 1, 1900, when the Act comes into operation, be a part of German maritime law.

The Comité International Maritime recently founded in Belgium, which met in Brussels on June 6 last, has put this particular reform at the head of its list.

The Shipowners' Parliamentary Committee sent a deputation in January last to wait on the Attorney-General and urge the adoption of the proportional rule by England. The Attorney-General thought the proportional rule ought to be adopted in England, and suggested that the Shipowners' Committee should enter into communication with the Board of Trade.

The three newspapers which most represent shipping interests—the *Shipping Gazette*, the *Liverpool Journal of Commerce*, and *Fairplay*—have all given their adhesion to the reform.

LESLIE F. SCOTT.

LIVERPOOL.

ON THE STUDY OF LAW REPORTS[1].

'The realities with which practising lawyers have to deal are the best correctives of any tendency to antiquarian trifling or wild philosophy, to which men of science might be prone. Theory is moulded to practice.' (Austin's Lectures on Jurisprudence, ii. 1125.)

IT is thirteen years since Lord Bowen, in the Presidential Address which he delivered to this Society[2], dwelt upon the spectacle of the great and continuous evolution of the English law as a whole, and eloquently advocated the value of the historical method as a method of studying the law pleasantly. May I now venture to urge upon you yet another method, and to call attention to the advantages of the study of contemporary law reports. Text-books occupy, and properly occupy, a large portion of the student's time and attention; but it should surely be possible to read these and yet not to leave the reports unread. From a few well-selected text-books of authority may be got that grasp of general legal principles and bird's-eye view of the law, which in this address I presuppose you to possess. If you have thoroughly read, assimilated, and made part of yourself even a very few such books you will be surprised to find how much you have learned. Every other book you read will induce the reflection that it is not all quite new to you. Then you may usefully begin the study of case law; for, as the learned Selden observed, 'he that begins with the study of the Reports and Cases in the Common Law will thereby know little of the Law[3].' From the reports you will learn how general principles are applied in particular cases. But you must get a good general idea of the landscape before addressing yourself to the particular trees of the forest. Even when this is done, not a few timorous spirits are, I fear, deterred from penetrating that forest by reason of its density; and it must be confessed that the growth is great and annually increasing.

Sir Edward Coke so long ago as 1603[4], in explanation of the ever growing quantity of the statute law, cited, in the quaint and classic manner so often met with in the old commentators and reporters,

[1] An Address delivered before the Birmingham Law Students' Society on April 6, 1897. Revised with additions and notes.

[2] On January 8, 1884. See Lord Bowen: A Biographical Sketch, by Sir Henry Stewart Cunningham, K.C.I.E., pp. 76–7, 165–8.

[3] The Table Talk of John Selden, by S. W. Singer, F.S.A., 3rd ed., 194.

[4] (1603) Twyne's Case, 3 Co. Rep. 82.

the following elegiac couplet, which he refers to as 'a good and short answer a wise man made, well composed in verse':—

'Quaeritur ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus[1].'

I may perhaps be allowed to translate the lines thus:—

'Do you ask why so many big law-books abound?
'Tis because bigger rogues in the world aye are found!'

On the other hand, Pascal, who was born in 1623, ten years before Sir Edward Coke died, expressed the view—not applicable to France alone—that while human inventions go on advancing from age to age the good and evil in the world remain pretty constant[2]. The first eleven parts of 'The Reports,' as Sir Edward Coke's reports are *par excellence* styled, were published between 1600 and 1615. It is difficult to believe that in the seventeenth century fraud and wrong-doing were so rife as materially to increase the number or add to the bulk of the law-books of his time as Sir Edward Coke suggests. The nature of the contents of the thirteen parts of his own Reports does not lend colour to his suggestion. Be this as it may, it is certain that in the nineteenth century fraud is but a small factor in the increase of our law. Honest transactions form the staple of business; and consequently 'the commercial world bases its transactions, not upon the hypothesis of fraud, but upon the hypothesis of honesty[3].' Law is the reflex of society, and if society become complex so must the law, and in a corresponding ratio. In an age when commercial undertakings assume gigantic proportions, and mercantile transactions daily become more multifarious and intricate, it is impossible that the law should be characterized by a simplicity that is compatible only with an age of barter. A Solomon dispensing justice in the gate is a spectacle not to be looked for in a community which is not tribal but cosmopolitan; nor in an age when railway, postal, telegraph, and telephone systems have done much to annihilate time and space; and when to go to Rome in three days is no longer a working instance of an impossible

[1] Lord Campbell is unduly hard upon Coke's literary qualities. He avers that he 'was more remarkable for memory than imagination, and had as much delight in cramming the rules of prosody in doggerel verse as in perusing the finest passages of Virgil' (Lives of the Chief Justices, i. 241). At any rate, Coke claims credit somewhere for having illustrated the knotty points and subtle distinctions of the law, with 300 extracts from the Mantuan bard!

[2] 'Les inventions des hommes vont en avançant de siècle en siècle. La bonté et la malice du monde en général en est de même' (Pensées, Art. XVI. 86). Mr. Herbert Spencer also has observed that 'the mere fact that in the same society, during the same generation, the ratio of crime to population varies within narrow limits, should be sufficient to make all see that human desires, using as guide such intellect as is joined with them, act with approximate uniformity' (The Man versus The State, 61).

[3] Per Bowen L.J., in 1886 C.A. *Easton* v. *London Joint Stock Bank*, 34 Ch. D. at p. 115. And see per Lord Russell of Killowen C.J. in *Marsh* v. *Joseph*, '97, 1 Ch. at p. 246.

condition. Arcadia, it has been observed, must have required a very simple judicature, not because of its innocence, but because life moved along a very few lines.

Vast and varied accretions to legal literature are the natural concomitants of our national progress. Sir Edward Coke, and lawyers equally industrious and painstaking who lived long after his time, are said to have literally mastered the law of England by the simple but exhaustive process of reading every line then written upon the subject. Even sixty or seventy years ago a substantial acquaintance with the entire literature of our law was by no means impossible; notwithstanding the remark of Lord Chief Justice Abbott that 'No attorney is bound to know the whole law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law[1].'

At the commencement of the present reign the text-books and reports necessary for a lawyer's library were comparatively few. But in 1859 we find Lord Campbell bewailing that 'the whole world is now insufficient to contain all the law reports which are published. I remember the time when a good-sized bookcase would hold all the law reports worth consulting, from the Year Books to the last volume of the Term Reports[2]. What is the remedy? Perhaps a decennial *auto-da-fé*[3].' Nearly forty years have passed since these words were written, and in the interval the rate of production of law reports and text-books has gone on increasing by leaps and bounds. When Sir Edward Coke wrote, the 'books at large,' namely the Year Books, and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by the Council of Law Reporting; while the Year Books from 1307 to 1535, 228 years, would fill not more than twenty-five such volumes[4]. I believe

[1] (1825) *Montriou* v. *Jeffreys*, 2 C. & P. 116.

[2] Henry Crabb Robinson in his Diary, ii. 115, writes that before the Summer Assizes of 1818 he dined with Gibbs C.J., 'who spoke with great earnestness against the Term Reports, as ruinous to the profession in the publication of hasty decisions.' If the learned Chief Justice could revisit the glimpses of the moon it would be interesting to know his opinion of the Weekly Notes! The Horatian advice '*nonumque prematur in annum*' is well enough for poetical but not for professional purposes. Reports must be issued promptly nowadays. Some of the law reporting before 1865 was badly delayed, but the present generation has gone in some directions to the opposite extreme and with disadvantageous results. [The Weekly Notes do not profess to be reports.—ED.]

[3] Life of Lord Campbell, by the Hon. Mrs. Hardcastle, ii. 384. A better remedy than an *auto-da-fé* has been found in the series of Revised Reports now being published under the editorship of Sir Frederick Pollock. These reports preserve all the still useful parts of the old reports and will, when complete, enable a huge mass of cumbersome rubbish to be cleared away from our library shelves. They already perform the office of an Index Expurgatorius of obsolete legal learning. Vols. 1 to 29 (1785–1830) are already issued.

[4] Stephen's Digest of the Law of Evidence, 3rd ed., 1877, xvii and note.

I am correct in saying that the 'Law Reports' published by the Council during the thirty-one years since 1865, when they began, to the end of 1896, fill no fewer than 265 volumes. Hence, quite apart from the numerous other series of reports now issued, the 'Law Reports' alone published during rather more than the last quarter of a century are more than ten times as voluminous as the reports which saw the light during a period of over more than two centuries and a quarter at an earlier stage of our history[1].

There has been a corresponding increase in the bulk of our statute book. The average number of statutes passed annually in the reign of Edw. I was nearly six and a half. During the present reign the annual average has reached 330. The statutes published by the Council of Law Reporting from 1865 to the end of 1896 fill thirty-three volumes[2]. This increase in legislative enactments necessarily brings in its train a host of new interpretative judicial decisions. Men not far past the prime of life can remember the time when there were no railways, no Railway Acts, nor of course a single one of the thousands of reported decisions which have followed upon those Acts[3]. The whole of what is called Company Law, with its countless decisions, is the creation of the past thirty-five years[4]. The law as to patents, copyright, designs, and trade marks in many of its most important features is the development of the past quarter of a century[5]. And it is to be borne in mind that, voluminous as our law reports are, they contain, or ought to contain, typical decisions only, which are but a fractional part of the whole.

[1] Sir Frederick Pollock estimates the total number of volumes of English Reports at something over 1,800, or about 2,000 if Irish Reports be included; and for the United Kingdom a total of about 2,300 volumes. If to these be added British Indian, Colonial, and American Reports the sum total of decisions reported in English fills not far short of 8,000 volumes (A First Book of Jurisprudence, 294–6).

[2] As to the growth of English Statute Law see The Statistics of Legislation, by F. H. Janson (Vice-president of the Incorporated Law Society), Journal of the Statistical Society, vol. xxxvi. May, 1873; and Mr. Herbert Spencer's The Man versus The State, 50. The Statute Law Revision Acts officially cleanse from time to time the Augean stable of the Statute Book, in much the same way as the Revised Reports are unofficially rendering a similar service as regards reported cases. The Statutes at large (1225–1865) fills 105 vols. Their continuation in the 'Law Reports' Statutes (1865–1896) fills 30 vols.; total 135 vols. The Revised Statutes, so far as they are published (1235–1846) occupy only 7 vols.

[3] In Browne & Theobald, Law of Railway Companies (1881), the Table of Cases fills forty-five pages of double columns of small print. After allowing for the fact that defendants' as well as plaintiffs' names are inserted alphabetically, it appears that some 2,500 cases are cited in the book.

[4] Similarly, the Table of Cases in the 7th edition (1897) of Buckley on Companies fills forty-four double columns referring to 3,382 cases, all, or nearly all, decided since 1862, when the first Companies Act was passed.

[5] In the 3rd edition (1890) of Sebastian on Trademarks about 1,500 cases are cited, or 1,000 more than were contained in the 1st edition (1878). These include several American decisions which, like the Apocrypha, though not to be applied to establish any doctrine, as Vice-Chancellor Bacon once observed, may be read for edification only. *London Financial Association* v. *Kelk*. The Times, Feb. 7, 1884.

But side by side with the growing complexity of our life and consequently of our law, and despite the multiplicity of Acts of Parliament and legal decisions, a process of condensation and simplification is, as we have seen [1], going on *pari passu*; and when the student has learned how to refer as well as how to read, he may enter on his professional life with a good heart. It should comfort him to know on good authority that 'all the reported English cases likely to be wanted for any ordinary professional purpose at this day might probably be contained in about one hundred and fifty volumes of the size of the 'Law Reports,' and the number which any one man has found it needful or useful to read carefully might possibly fill, at a rough guess, twenty or twenty-five such volumes [2].'

So much then for the knowledge of the past. But the law student and practising lawyer alike must be alive to the daily developing law of the present if he would do his work properly. A lawyer, of all men, must be ever a learner. And he cannot learn without he keep himself abreast with the current of recent decisions. Such knowledge is essential for every one who aspires to be rightly considered a lawyer; from the oldest and most experienced judge on the bench to the youngest articled clerk, a tyro in a solicitor's office. Lord Wensleydale once told Baron Bramwell that no judge who did not read the reports could do his duty; and Baron Bramwell, when giving evidence before the Common Law Commission in 1857, assured the Commissioners that he had acted upon this advice [3]:—

'When I was at the Bar,' he said, 'I did not pretend to read the reports, and my clients knew that I did not read them, and they took me for better or worse with notice. But I cannot serve the public in that way, and I read them now diligently and faithfully, and they require time. . . . I read what I suppose you may call the orthodox reports of the three Common Law Courts, namely, Ellis and Blackburn, the Common Bench Reports, and Hurlstone and Norman. I read the Law Journal Reports, Equity and Common Law, and I read the Jurist Reports. I read over the same case very often three times; but, if I do not do so, I am not sure that I shall not miss it, so I read it to make sure. If I find upon reading it I remember it, I do not trouble myself to read any further . . . I am almost reluctant to call it a labour, because, as I have said before, it is more often to me an amusement than anything else; but if it were not an amusement I should still have to do it. No doubt, if it were not there to be done, one would not do it; so that in that sense it may be said that the multiplicity of reports causes an additional amount of occupation. It may be asked, "Why does

[1] See above, p. 252, note 3; p. 253, note 4.
[2] Sir F. Pollock, A First Book of Jurisprudence, 296.
[3] 'Report from the Common Law (Judicial Business) Commissioners, 1857; together with the Minutes of Evidence and Appendix,' p. 4. Eyre & Spottiswoode, 1857.

one not (*sic*) read the same thing in duplicate?" My answer to that is that, if I distinctly comprehend the case when I read it I do not trouble myself to read it again; but it very frequently happens that you find varieties of expression in the judgments, where they have not been considered or written, of such a character that it is quite desirable that you should read both reports.'

If this were the rule prescribed as necessary to be followed by himself, and which so great a master of the Common Law and so astute and subtle a judge as Lord Bramwell so faithfully observed, how much more necessary is the study of the law reports for lesser minds. And yet there are practising barristers and solicitors, to say nothing of law students, who pretermit any such systematic study; living, so to speak, from hand to mouth, and looking up decisions in digests only as occasion requires.

It is to be feared that the high degree of perfection, both as to completeness and accuracy, to which digests of cases have been brought in our time, is largely responsible for some neglect of the cases themselves; and tends to beget a generation of index-hunters and digest-suckers. But it should never be forgotten that digests are merely time-savers for busy practitioners; and that their office is not that of teachers of the apprentices of the law. They are good servants but bad masters. They will not make a man a lawyer any more than the abuse of 'cribs' without the use of lexicon and grammar will make a schoolboy a scholar. 'Certain it is,' says Sir Edward Coke, 'that the tumultuary reading of abridgements doth cause a confused judgment;' and he never wearies of pressing home the advice 'to use abridgements as tables, and to trust only to the books at large: for I hold him not discreet, that will *sectari rivulos* when he may *petere fontes*[1].' Do not therefore suppose that digests are a royal road or even a short cut to learning. Do not pin your faith to them, but treat them merely as adventitious aids, as sign-posts which should but put you on further inquiry. Remember that they are not to be made excuses for indolence; for has not Pope reminded us—

'How Index-learning turns no student pale[2]?'

In short, if I may adopt a phrase I have somewhere seen, Digests of the Reports no more represent the law than a dictionary does Paradise Lost, or a few hedge-row weeds the Garden of Eden. Unless the law student assimilate the decisions from the reports themselves, he cannot become a considerable lawyer, however successful from a worldly point of view he may be—and I confess I have known prosperous practitioners who have been comfortably

[1] 4 Co. Rep. Pref. xi. And see 5 Co. Rep. 25 a; 10 Co. Rep. 41 a, 118 b.
[2] Dunciad, Bk. i. 279.

ignorant alike of first principles and of the latest decisions. Sir Joshua Reynolds in one of his now too little read *Discourses*[1] remarks that 'the daily food and nourishment of the mind of an artist is found in the great works of his predecessors. There is no other way for him to become great himself.' He emphasizes his point by this whimsical quotation from an ancient Natural History:

'Serpens, nisi serpentem comederit, non fit draco.'

And he adds, by way of comment, 'however false as to dragons, it is applicable enough to artists.' I would venture to add, and to students of the law.

In connexion with the subject of reading, there are three points to which attention is necessary; to learn to read, to learn what to read, and to learn how to read. Writers and speakers who proffer advice and give hints on the favourite topic of reading, as a rule, assume the first, lay stress upon the second, but omit all reference to the third of these points—How to read; by which I do not mean elocution, but how to 'disembowel a book' as Baron Alderson was said to do. It is a great art, and a valuable accomplishment, to know how to read in a book as distinguished from reading it.

Having urged upon you the importance of reading the reports, I propose now to offer a few suggestions as to how they should be read; and if in what I say I appear to be expounding the obvious, my excuse is that I desire, if I can, to be of use to the youngest student among you. If to any of you what I say appear elementary, and to come as nothing new, then I can only say so much the better for you.

A reported case usually consists of six parts—(1) the title of the case; generally the names of the parties to an action, or the name of the subject-matter of the litigation, e.g. *Re* So-and-So; (2) the catchwords; which precede the headnote and are intended to indicate, in the briefest possible way, the nature of the subject-matter of the decision, and to show the practitioner at a mere glance whether the case is in point for his purpose; (3) the headnote; (4) the statement of facts; (5) the arguments of counsel; and (6) the judgment of the Court.

The first two of these call for no remark; and I proceed therefore to say a few words on each of the others. First, then, the headnote. This should be carefully read. A properly constructed headnote should, as Lord Justice Lindley has observed, contain the legal pith and marrow of the case, and nothing more. It should,

[1] Discourse xii. Delivered at the Royal Academy, Dec. 10, 1784.

moreover, be confined to what it professes to be, namely, a note, a real note of the point decided or discussed, and not, as it has been well put, 'a huddled abridgement of the facts followed by a bald statement of their result in the particular case[1].' Many reports, old and modern alike, have been sad offenders in this particular. It is by no means as easy as at first sight appears to frame a good concise headnote. The best are perhaps those which state no facts at all; and if a headnote cannot be intelligibly constructed without a lengthy analysis of the facts of the particular case, that is in itself prima facie ground for suspecting that the case ought not to be reported at all. The only redeeming advantage of the practice of setting forth an analysis of the facts in the headnote is that such reports constitute a series of problem papers; and enable the student by covering up all that follows the word *Held* towards the end of the headnote, to ask himself what the decision on the facts stated ought to be. This indeed affords excellent training, especially as, if he find that his mental answer differs from the decision of the Court, he has the means immediately at hand of correcting, or at least of reconsidering, the conclusion at which he had by his own unaided efforts arrived; and if the reasoning of the judgment as reported convince him, the case will be found to make a far deeper impression on his memory than if it had been perused straight away without any such previous reflection as to how it ought to have been decided.

Next comes the opening statement of facts, and then the arguments of counsel. These are sometimes reported—especially in the older reports—at inordinate length. Sometimes, however, it is gratifying to find—to use the familiar language of the reporters—that the facts, or at any rate the arguments, 'are sufficiently set forth in the judgment.' Even where this is not so stated and both facts and arguments are fully reported, they may as a rule be passed over by the student. The arguments on which the decision of the Court proceeds are almost certain to be contained in some shape or form in the judgment, together with such references to and comments upon the opposing arguments as may be needful for a proper understanding of the principle or of the authorities according to which the question or questions at issue are determined by the Court. If on reading the judgment you find that any point is not made clear, or the drift of the reasoning is not fully comprehended, then you may usefully turn to the arguments of counsel for further information. But if you read all the argu-

[1] Sir Frederick Pollock's Introduction to 1 R. vi–vii, referring to article by Lindley L.J. on 'The History of the Law Reports' (LAW QUARTERLY REVIEW, vol. i. 143).

ments in a case you are more liable to forget what the actual decision of the Court was.

Moreover, the arguments of counsel have not been unknown 'to darken counsel.' It has been said that the greatest lawyer is not he who knows the most law; but he who sees at a glance the real question involved, the point of a case as it is called, and also sees the true principle applicable to it: for cases have before now been carried through all the Courts to the House of Lords without the counsel on either side, or the Judges in the Courts below, having discovered the real governing principle. Even eminent and learned advocates, through anxiety not to miss a point, excess of zeal, imperfect grasp or insufficient knowledge of the facts, inadequate instructions, or an erroneous view of the law, being but human, will sometimes urge untenable arguments—'arguments of despair' was a favourite expression of the late Lord Justice Kay [1]—and cite a host of useless authorities which the reporters in their turn, being also not infallible, duly set down and in the fulness of time report. It is melancholy to think that, as Mr. Justice Manisty once observed, 'there is nothing too absurd but what authority can be found for it [2].' In another case Lord Esher complained in giving judgment that 'every case upon the subject that industry could find and ingenuity could torture was brought before the Court [3].' An 'ingenious' argument has been said to be nearly always wrong, though a wrong one is not nearly always ingenious. The learned judge just quoted characterized an argument in another case as 'the very acme and essence of ingenious fallacy, and it shows the length to which advocacy will sometimes go [4].' Moreover, an ingenious argument is not always an ingenuous one; and such have been known to be addressed to the Court, not out of sincerity on the part of the advocate but as a mere 'try on.' For the credit of English advocates I prefer to take an amusing, though I would fain hope an apocryphal illustration from across the Atlantic. In arguing a point before a judge of the Superior Court, one Colonel

[1] See (1886) *Petty* v. *Daniel*, 34 Ch. D. at p. 176; (1890) *Finck* v. *L. & S. W. Ry. Co.*, 44 Ch. D. at p. 341.

[2] (1888) *Henderson* v. *Preston*, 4 Times Reps. at p. 633.

[3] *Turner* v. *Mersey Docks & Harbour Board*, '92, P. at p. 297. See also remarks of A. L. Smith L.J. in *Re Floyd*, '97, 1 Ch. at p. 638; and of Cave J. in *Pratt* v. *S. E. R. Co.*, '97, 1 Q. B. at p. 721.

[4] (1885) C. A. *Exparte Reynolds re Barnett*, 15 Q. B. D. at p. 188. In another case the same learned judge passed some even more severe strictures: 'It really requires the stress of such a case as this *even to excuse or authorize counsel to contend* that what a lady's maid has said about what her mistress has said, is evidence of what the lady herself has said.' (1884) *Fearon* v. *Earl of Aylesford*, 14 Q. B. D. at p. 804.

Vice-Chancellor Bacon would occasionally comment severely on over-bold advocacy. He more than once described cases which came before him as being most extraordinary in themselves, but more extraordinary still the arguments which counsel had addressed to him in the course of them, e. g. (1885) *Gandy* v. *Gandy*, 30 Ch. D. at p. 62; (1885) *Re Miller's Dale and Ashwood Dale Lime Co.*, 31 Ch. D. at p. 214.

Folk of the Mountain Circuit in North Carolina laid down a very doubtful proposition of law. The judge looked dubiously at him for a moment, and then said: 'Colonel, do you think that is law?' The colonel bowed gracefully and replied: 'Well, as your Honour puts it to me that way, candour compels me to say that I do *not*; but I did not know how it might strike your Honour.' No wonder that the Court, after deliberating a few moments, gravely observed: 'Colonel, that may not be contempt of Court, but it is a *very* close shave!' Perhaps the nearest parallel to anything of the kind to be found in the reports of our time is the following comparatively mild rebuke administered by Lord Justice Bowen in an appeal case: 'The distinguished counsel who argued this case before us have, I think, drawn three red herrings across the path of the Court, in the hope that we should be drawn off the scent[1].' The student can afford as a rule to pass straight from the headnote to the judgment. The judgment is essential, the argument more or less accidental; though it is not necessary to go so far as the cynic who observed that counsel's speeches were invented because something is required between the statement of the case and the judgment, to give the Court a little space to abstract itself and consider what the judgment should be.

'One of the pleasures of going to the Bench from the Bar,' said Chief Justice Wilmot, 'is that you have to find truth instead of arguments.' But a seat on the Bench, I need hardly remind you, does not confer infallibility in truth seeking, or in the exposition of the law. In commenting upon a proposition submitted to him as decided law Mr. Justice Maule observed that he did not believe any such absurd law had ever been laid down—'although,' he caustically added, 'it is true I have not yet seen the last number of the Queen's Bench Reports.' Judgments are not infrequently over-ruled; and as the chief value of reading over-ruled decisions has been said to be to enable one to examine into the errors of great minds[2], and this appertains to the province of students of philosophy and of human nature rather than that of law students, I recommend you as a general rule not to read over-ruled judgments. It does not follow of course that they are wrong; but they are not law, and so may, as mathematicians say, be neglected. The ordinary law student will find quite enough to do, and ample scope for his intellectual powers, in mastering the over-ruling decisions, even though they too may sometimes not be ideal law, and may

[1] (1883) C. A. *Re Blackburn & District Benefit Building Society*, 24 Ch. D. 421.
[2] See Lectures on the Law of Negotiable Securities, by Mr. William Willis, Q.C. (1896) at p. 22.

even in their turn be reversed. But in the meantime he will do well to take them, so to speak, *de bene esse*.

Subject to what I have said on this point you should therefore read, mark, learn, and inwardly digest the judgments in the contemporary law reports. And I advise you to read the reported cases one and all, though not all necessarily with the same degree of care and attention. Some will require and deserve more detailed mastery than others. But all should be read: First; because having been selected for reporting there is almost certain to be something decided in them which should not be wholly ignored. Secondly; because you will then have the satisfaction of knowing that practically no case of importance can be referred to which you have not seen. You may not remember which way it was decided, but the chances are that you will remember it *was* decided, and you will be able to readily turn it up in a digest. Lord Palmerston used to say that knowledge of reference is knowledge in itself. It is, however, rather potential than actual knowledge; and the older saying is the more accurate:—*Qui scit ubi sit scientia proximus est habenti*. I have already indicated that he who trusts to a digest alone for his law cannot be regarded as *habens*; at best he is but *proximus*. Thirdly; the mental training which results from reading cases of even secondary or what may appear to be remote importance is not inconsiderable. Besides, you cannot say how soon you may be called upon to advise on matters of a most unlikely and out of the way character, in which your reading of such cases will prove useful. Still, there must be a limit somewhere, so bearing in mind Chaucer's line—

'The lyfe so short, the craft so long to lerne[1],'

you will find it enough to confine your attention to one series of the reports. Lord Bramwell's practice, to which I have alluded, of studying more than one series of reports must I think be treated as a counsel of perfection, at any rate for the student. The practising barrister or solicitor will often have occasion to master the statement of facts in detail, and to scrutinize closely the argument s in a reported case, when referring to it to ascertain to what extent if at all it forms a precedent for the particular matter of business with which he is immediately concerned. He will sometimes be wise, as Lord Bramwell recommends, to refer to more than one report; because it frequently happens that different reports contain varieties of expression—which though slight may nevertheless be significant and important[2]—in the judgments, which moreover will occa-

[1] The Assembly of Foules, 1.

[2] For a recent illustration see *Tate* v. *Latham & Son*, '97, 1 Q. B. at pp. 505, 507.

sionally be found reported at greater length in one series of reports than in another.

There no longer exist in this country any 'authorized reports'; notwithstanding that learned judges from time to time employ that or some similar expression to distinguish the 'Law Reports'[1] from other reports. The 'Law Reports,' however, cannot be said to occupy more than a semi-official position, due to their production under the auspices of the Council of Law Reporting. The fact that many of the judgments in the cases reported are revised by the judges themselves is an advantage not exclusively confined to the 'Law Reports'; and there are other series of reports (notably the 'Law Journal Reports') which both obtain and deserve support and attention[2].

Having offered these suggestions as to how to read law reports, I would now point out some other advantages of the study.

I have already said that the reports afford an excellent means of intellectual gymnastic. Their perusal will tend to the formation of a habit of mind as distinct from the mere acquisition of information. The growth of learning in a student is for the most part imperceptible. But he can hardly rise from the careful study of a number of law reports without feeling sensibly braced and invigorated. Quite apart from the question whether the law laid down or applied in the judgments determined in our Courts be sound or not, the manner in which it is there expounded is an education in itself. Whether a judgment be correct or not you may generally depend on its being expressed in simple, terse, and lucid English, and marked by clearness of thought as well as of expression. The nomenclature of any art or science must to some extent be caviare to the general; but, considering the fact that our

[1] Thus in C. A. (1883) *Wilson* v. *Turner*, 22 Ch. D. at p. 526, Jessel M R. drew a distinction between 'the authorized reports and the Law Journal Reports'; and Cave J. recently drew a similar distinction between 'the regular Reports' and the Law Times Reports, *Cowen* v. *Town Clerk of Kingston-upon-Hull*, '97, 1 Q. B. at p. 282. It may therefore be worth while to point out that no set of reports now has in law any paramount authority over any other. Here, as is so often the case in discussions concerning rules of evidence, questions of *admissibility* and *weight* are frequently confounded. The sole and simple test whether a report is entitled to be cited as an authority, is whether it has been prepared by a barrister. The mere manuscript note of a counsel who happens to hear a decision, whether he be engaged in the case or not, is technically as *admissible* as an authority as the most favoured and expensive series of law reports.

[2] There are certainly none nowadays that deserve such censure as fell to Espinasse's Nisi Prius Reports; of the cases in which it was said that Mr. Espinasse seemed to have heard one half and to have reported the other half. With this may be compared Anderson C.J.'s note on Coke's report of *Shelley's* case: *Mais rien de c. fuit parle en le Court ne la monstre*, i. e. nothing of the kind was said in the Court nor declared there. See Wallace, On the Reporters, 119. Lord Mansfield was equally severe upon Barnardiston's Reports of Cases in Chancery, and absolutely forbade counsel to cite them, saying that it was marvellous to those who knew the reporter, and his manner of taking notes, that he should so often stumble upon what was right; but yet that there was not one case in his book that was so throughout (2 Burr. 1142 marg.).

law still retains in its 'terms of art,' as they are called, so much of the antique terminology of the past—more perhaps than any other branch of learning, certainly more than theology or medicine—and is concerned with a variety of abstruse doctrines of ancient origin, the simplicity and logical expression of our legal literature in general, and of judicial decisions in particular, is a matter for pride and congratulation. Blackstone is a classic of literature as well as of the law, and is essentially readable by any intelligent layman in any edition which is undisfigured by the patchwork—far from being purple patches—of his modern editors. And we are told that in the days of the war with France, some English gentlemen, nowise connected with the profession of the law, beguiled their tedious exile at Verdun by a serious perusal of Coke upon Littleton, and often spoke of the great mental delight which it afforded them [1]. It is rare to find a reported case in which, in the judgment, difficulties are evaded by recourse to any such vague generalities or obscurity of expression as in some departments of life, politics for instance, are commonly resorted to for the purpose of disguising thought or its absence. The literature of our law compares favourably with that of most modern philosophy in the matter of its expression; at any rate so far as concerns the avoidance of falling, as it has been neatly put, into neither the right-hand ditch of ambiguity nor the left-hand one of verbiage. It extorts, as we have seen, the admiration of laymen as well as of lawyers. Not long since, in the course of a debate in the House of Lords, the Duke of Argyll said, 'I never pass over any great judgment without carefully reading it. In the great decisions of the judges you have pure logic, pure reason [2].' That is testimony of which lawyers have a right to feel proud.

I might cite the opinions of eminent jurists and others as to the educational value of legal studies [3]. But in the hope and belief that they will be of special interest, let me, in support of my plea for a systematic study of the law reports, pray in aid the testimony of two of our English novelists. George Eliot makes one of her characters, in discussing the choice of the law as a profession, retort upon an allusion to the immense amount of rubbish a lawyer is supposed to have to stow in, by pointing out that the so-called 'law-rubbish' is no worse than any other sort. 'It is not so bad

[1] Reminiscences of Charles Butler, Esq., of Lincoln's Inn, 4th ed., 113. John Murray, 1824.

[2] Debate on the Third Reading, in the House of Lords, of the Marriage with a Deceased Wife's Sister Bill. The Times, July 11, 1896, p. 8.

[3] For instance, Austin's Essay On the Uses of the Study of Jurisprudence, in which he, following Leibnitz, maintains that the study of the rationale of law compares favourably with that of mathematics, as an exercise for the mind in the process of deduction from given hypotheses. Lectures on Jurisprudence, ii. 1123.

as the rubbishy literature that people choke their minds with. It doesn't make one so dull . . . Any orderly way of looking at things as cases and evidence seems to me better than a perpetual wash of odds and ends bearing on nothing in particular. And then from a higher point of view, the foundations and the growth of law make the most interesting aspects of philosophy and history. Of course there will be a good deal that is troublesome, drudging, perhaps exasperating. But the great prizes in life can't be won easily[1].' Again, Robert Louis Stevenson, in his last romance—which the hand of death has left a torso—says that, 'to be wholly devoted to some intellectual exercise is to have succeeded in life; and perhaps only in law and the higher mathematics may this devotion be maintained, suffice to itself without reaction, and find continual rewards without excitement[2].'

In commending the study of the reports to you on these grounds I would further remind you that they are intensely interesting in themselves. English law is conterminous with English life; and the reports are successive records of their parallel development. The reports are a microcosm of the great world about us, a moving panorama of varied and progressive life. Just as the High Court of Parliament concerns itself alike with imperial and parochial matters; and within the same hour may have to deal with intricate problems of high politics, affecting international relations, and a question about a humble village pump in some remote corner of England, in much the same way, to use a familiar illustration, as a steam hammer may be employed to forge an armour plate or to crack a nut; so the High Court of Justice and the Appellate Courts of this country are called upon to determine an infinite variety of questions great and small, and from all quarters. Take for instance the work of the Judicial Committee of the Privy Council. Attention has been recently directed to the unequalled variety and extent of its jurisdiction, and to the fact that in a single year it may have to consider not only questions of English law, but questions of constitutional law of moment to all civilized countries, cases dependent on Hindu or Mahommedan law, on texts of the Digest, on the Roman Dutch law as expounded by Grotius, on the Ordonnances of Louis XIV, on the Coutume de Paris or other portions of the old customary law of France before the Revolution, or on the ancient customary law of the Duchy of Normandy[3]. As all roads are said to lead to Rome, so do all things great and small, every popular craze and new invention or fashion, scientific, literary or artistic,

[1] Daniel Deronda, chap. lviii.
[2] Weir of Hermiston, chap. ii. Cf. p. 262 above, note 3.
[3] Journal of the Society of Comparative Legislation, vol. i. vii (Aug. 1896).

tend to find their way sooner or later, and in one form or another, into our Courts. Thus, 'masher' collars, the design of which was said to be infringed, and woodcuts of which embellish the report of the case in the 'Law Reports,' gave rise to an interesting question as to the law of designs[1]. More recently, the novel 'living pictures' produced at the Empire Palace in 1894 raised quite a large crop of fresh and instructive points in the law of copyright for solution by the Court of Appeal and House of Lords[2]; while the 'Carbolic Smoke Ball' advertisement resulted in a new and extremely interesting application of the principles of the law of contract[3]. Even the right to reproduce that never sufficiently to be execrated music hall song, 'Tara-ra-ra-boom-de-ay,' formed the subject of animated litigation before Mr. Justice Stirling. At times our courts of law are, by means of 'exhibits,' made to present the appearance rather of a tradesman's showroom, or a scientific laboratory, than of the temple of Themis.

In fact, one of the most wonderful characteristics of the law reports is their infinite variety, which age cannot wither nor custom stale. Ancient and modern doctrines, names, and modes of thought, jostle one another in their pages; and no better motto could be found for any and every volume of our law reports than the oft-quoted line of Juvenal:—

'Quidquid agunt homines nostri est farrago libelli[4].'

The great English lawyers have recently been aptly described as not so much jurists and philosophers, as 'advisers of particular men, in particular difficulties, for particular fees[5].' Similarly you will find that the law reports have not merely an academical interest, but bring you into close touch with human affairs and with business life. You may learn much from them as to how commerce is carried on, and great mercantile concerns conducted, how shipping business is done, and industrial institutions, such as building and friendly societies, are managed. I will mention, by way of illustration, one or two recent examples only out of a score which might be taken. In the important case of *Vagliano Brothers* v. *The Bank of England*[6] the question was whether the Bank or its customers were liable to bear the loss occasioned by the fraud of one Glyka, a clerk of the customer, to the extent of £71,500. From the lucid

[1] (1884) C. A. *Le May* v. *Margetson & Co.* 28 Ch. D. 24.
[2] e. g. *Hanfstaengl* v. *Baines & Co.*, '95, A. C. 20.
[3] *Carlill* v. *Carbolic Smoke Ball Co.*, '93, 1 Q. B. 256.
[4] Contrast, for instance, the mediaeval archaism that pervades *Western* v. *Bailey* (heriots), '96, 2 Q. B. 234; S. C. on app., '97, 1 Q. B. 86, with the *fin de siècle* modernity that enlivens *In Re Holt & Co.'s Trademark* (Trilby), '96, 1 Ch. 711—contemporaneous cases.
[5] Introductory Lecture on the Law of Fraud, at University College, Dec. 5, 1896, by Mr. Augustine Birrell, Q.C., M.P.
[6] 22 Q. B. D. 103; on appeal, '91, A. C. 107.

and carefully prepared statement of the material facts, with which the report of the case in the Queen's Bench Division opens, and which was taken from the judgment of Mr. Justice Charles, you will get a good idea of the system and general course of business in the office of a great London merchant and foreign banker, where the various daily mercantile transactions are both of an intricate nature and of enormous magnitude. Again, you may learn a good deal as to the way in which stockbrokers conduct certain kinds of business with their bankers, and at the same time find a clear and succinct account of transactions on the Stock Exchange carried on on the 'contango' or continuation system, from the statement of facts in the case of *Bentinck* v. *London & Joint Stock Bank*[1]. Or, if you would see something of the true inwardness of, and get an insight into the secrets of the prison-house of the worst type of company promoting, you may do so by the aid of more than one recent decision[2].

Open the reports where you will you will find yourselves in touch with actual life, and be refreshed by them, like Antaeus by contact with his mother-earth. Every one of the cases they contain is at once a record and an epitome of a real scene in the battle of life. There is not a case in the reports that, to borrow a picturesque illustration, does not stand like an Alpine cross to mark the scene of some fateful or fatal event. Each is the result of a keen conflict of human interests, strenuously conducted, and the issue of which was anxiously awaited, by reason of the momentous consequences to purse, person, or reputation involved. The Courts of this country will not resolve abstract legal questions or doubts. They concern themselves only with genuine cases of actual fact when they arise; and not infrequently expressly decline to decide a point raised incidentally, even though it be one of importance and the settlement of which is urgently desired, on the ground that its determination is not necessary for the decision of the particular case. It is accordingly left to be dealt with if and when it be specifically raised for decision thereafter in the due course of bona fide litigation.

There is no means known to our system of law by which a binding judicial decision can be obtained on a purely abstract question of law; even though a benevolent millionaire were willing to provide the means for getting undecided or doubtful points of law settled for the benefit of the community at large. A case may be selected for trial as a 'test case,' as it is called; but

[1] '93, 2 Ch. 120.

[2] e.g. *Re T. E. Brinsmead & Sons*, '97, 1 Ch. 406; and *Re Consort Gold Mines, Ld., Exparte Stark*, '97, 1 Ch. 575.

if so it must be an actual typical case selected for decision as a precedent to govern other actual cases from amongst which it has been selected. An unsuccessful attempt to evade this rule was made in our own time in a collusive action, with obvious and studied omissions in the pleadings, brought by a friend and constituent of Mr. Bradlaugh against him, ostensibly and nominally for £500 penalties under the Parliamentary Oaths Act, 1866, for having sat and voted in the House of Commons on February 21 and 22, 1882, without having made and subscribed the necessary oath; but really for the purpose of obtaining a decision of the question whether a duly elected Member of Parliament, as Mr. Bradlaugh was, is competent to administer the oath of allegiance to himself, as he had attempted to do, so as to entitle him to sit and vote. The Court (Manisty and Watkin Williams JJ.) before whom the action first came on demurrer, *proprio motu* intervened and declined to hear the case, and referred to authorities showing that the proceedings were a sorry fraud upon the Court, which the Court had sometimes punished as a contempt with imprisonment. On the action afterwards coming on for trial, Mr. Justice Mathew also refused to entertain it, or to allow it to go to the jury, at the same time pointing out the danger of permitting parties to bring a case before the Court in a fictitious suit, stating only such facts as they think proper for the opinion of the Court [1].

This case presents an interesting and striking contrast to the practice of the Roman law; under which legal points were authoritatively settled by means of the *responsa prudentum*, that is, 'answers of the learned in the law.' The great lawyers who delivered these *responsa prudentum* not only adjusted the law to states of fact which actually presented themselves, but also speculated on its possible application to others which might occur [2]. An abstract question of law such as that which our Courts declined to determine in the Bradlaugh case would probably have been decided under the Roman law by means of a *responsum* of some well-known jurisconsult; which would, moreover, have been regarded as a binding authority. For, as Sir Henry Maine observes, 'any name of universally acknowledged greatness clothed a Book of Responses with a binding force hardly less than that which belongs to enactments of the legislature.' The Roman Republic

[1] (1882) *Gurney* v. *Bradlaugh* (unreported). For the proceedings on demurrer see *The Times*, May 16, 1882; and for the trial at Nisi Prius, *The Times*, Nov. 20, 1882. The question upon which a decision was thus sought to be obtained was afterwards properly raised, and decided against Mr. Bradlaugh, in C. A., 1885, *Att.-Gen.* v. *Bradlaugh*, 14 Q. B. D. 667. This decision led to the passing of the Oaths Act, 1888 (51 & 52 Vic. c. 46).

[2] Maine's Ancient Law, chap. ii. 34; see also Sir F. Pollock, Essays in Jurisprudence and Ethics, 60.

had nothing corresponding to our English Bench. Hence the *responsa prudentum* answered much the same purpose as our case law, with this difference, that with us cases are decided by the judges, while the *responsa* were authoritative expositions of what we should call the leaders of the Bar. Our law supplies no parallel to these *responsa*. A text-book by a living writer, even though the author be a judge of the highest eminence, does not constitute even a quasi-judicial, much less a binding authority; and at most can only be adopted by an advocate as his own argument[1]. It is difficult for an English lawyer to imagine a condition of things under which an opinion expressed in a contemporary standard legal text-book, or the written opinion of a learned Queen's Counsel should be regarded as of equal authority with a considered judgment of the House of Lords or the statutory provisions of an Act of Parliament. The practice in this respect of the civil law finds, however, a modern counterpart in Germany, where precedents are not binding, and text-books have often more authority than decided cases.

I cannot leave my subject without a few words more as to the literary interest of the law reports. It is a genuine pleasure from time to time to happen upon judgments, or passages in judgments, that in point both of matter and manner are worthy to rank as literature. I will not go back to the long past whence examples crowd to remembrance. It is sufficient to refer for passing illustrations to one or two of the names of our own time, though I naturally omit living occupants of the Bench. I may mention the pure and graphic style of the judgments of Vice-Chancellor Bacon who so far as in him lay kept the law clear of 'the stock-jobbing jargon which nowadays pollutes the well of English undefiled[2].' Then we have the strong nervous English which pervaded the utterances of Lord Justice James; as in the eloquent periods and picturesque illustrations by which he expounded the modern principles upon which the Courts proceed with regard to granting injunctions to restrain nuisances[3]. And who does not take delight in the sound law and common sense, combined with characteristic shrewd mother-wit, that breathe in the judicial deliverances of Sir George Jessel, as in the well-known judgment in which, in a vein of racy,

[1] See preface to Fry on Specific Performance, cited by Kekewich J. in (1887) *Union Bank* v. *Munster*, 37 Ch. D. at p. 54; and Sir F. Pollock, First Book of Jurisprudence, 228–9, 275.

[2] (1886) *Re Vernon Evens & Co.*, 32 Ch. D. 187, where he protested against the use of 'finance' as a verb. It may be here noted that the term 'allotment' is one of the latest births of Time, and is nowhere found in the Companies Acts (see per Chitty J. in (1884) *Re Florence Land Co.*, 29 Ch. D. at p. 427). The same may be said of 'promoter,' 'syndicate' *et hoc genus omne*.

[3] (1874) C. A. *Salvin* v. *North Brancepeth Coal Co.*, L. R. 9 Ch. 705.

indeed almost boisterous humour, he sets forth the still vital mysteries of the ancient doctrine, now close upon three centuries old, of accord and satisfaction[1]? As a final example I would refer to the luminous exposition, the terse epigrammatic expression, wedded to a broad and enlightened grasp of principle, which inform the utterances of Lord Bowen, whose recent loss we are still deploring. He was a master of the art of expression. His judgments abound in forcible well-turned sentences, not infrequently illumined with flashes of lambent humour. He would at times embalm as it were in one short happy phrase a principle of rule: as in the three words in which he illustrated, and at the same time summed up, the doctrine of non-rateability where there is no possibility of beneficial occupation, as in the case of a light-house tower which is by law 'struck with sterility[2].' The student who has an eye for style, and the literary instinct, will have no difficulty as he turns over the pages of the reports, in finding ample opportunities of gratifying his tastes.

If any further incentive be wanted to spur you on to the pleasurable studies of the law, I can desire no better than that which is contained in the following noble passage which I happened upon recently, from the pen of one who in his day was eminent both as a lawyer and as a man of letters—Mr. Justice Noon Talfourd:—

'Let us follow, then, the retained advocate into the studies which prepare him for the delivery of learned argument on some question arising on the law of real estate. He penetrates the maze of precedents and authorities to search after the leading principle of his subject, and traces its application in the succession of decisions with strenuous care. Dry, hard, and uninteresting as the labour seems, it soon generates its own fervour, and becomes its own reward. The faculties which would else be relaxed and dissipated among various exciting pursuits are braced and strengthened by the silent toil; the very remoteness of the subjects of inquiry from the ordinary aspects of business imparts a certain elevation and refinement to the study which masters them; while the habit of continuous exertion, frequently piercing through the accumulated illustrations and distinctions of ages to the same ancient principles of law, though in different directions, invests life itself with the consistency which belongs to singleness of purpose and aim. His

[1] (1881) *Couldery* v. *Bartrum*, 19 Ch. D. 394. A vigorous but unsuccessful attempt was three years later made to get rid by judicial decision of the doctrine, which dates from (1602) *Pinnel's* case, 5 Co. Rep. 117 a, but the House of Lords declined to usurp legislative functions with respect to it. (1884) *Foakes* v. *Beer*, 9 App. Cas. 605.

[2] (1884) *West Bromwich School Board* v. *Overseers of West Bromwich*, 13 Q. B. D. at p. 943. The phrase may be said to have become classical in rating cases. See 14 Q. B. D. at p. 786; '93, A. C. at pp. 592–1; '97, 1 Q. B. at p. 172.

progress is not uncheered by reliefs the more welcome as they are laboriously earned; a sidelong glimpse into English history and ancient manners; a quaint jest of some judicial reporter in which the stout-hearted writer seems still to live and to enjoy; some classical allusion redolent of the days of youth whereby Coke or Hale refreshed themselves as they wrote; some antique pleasantry which breathes a sort of wallflower perfume from the solid mass which centuries have darkened but have not shaken[1].'

If by anything I have said I may be the means of helping a single student in his study of the law, or of inspiring him with a desire to pursue his studies with greater zest and eagerness, by showing him how interesting, if rightly regarded, those studies may be made, I am more than content. The first of the two great novelists whom I have already quoted makes another of her characters in the same novel say that 'the best augury of a man's success in his profession is that he thinks it the finest in the world'; adding, 'but I fancy it is so with most work when a man goes into it with a will.' The practice of our profession involves much drudging toil, much tasteless routine, and the coming into contact with not a little of the sordid pettiness of life. If it have its rewards it has also its disappointments. But such too are the experiences of other vocations: and, when all is said, we may confidently claim that in its higher aspects, in the region of pure law, and in the noblest part of its practice, there is no finer profession in the world. But a strenuous devotion is required of its votaries, and its rewards are not for the indolent or the half-hearted. It is a race, the earthly reward of which, like that 'immortall garland' of the ancient games of which Milton speaks, 'is to be run for not without dust and heat.' I cannot do better than close with those golden words which Plato[2] puts into the mouth of Socrates when near his end: 'We ought then to leave nothing undone that we may attain unto wisdom in this life—καλὸν γὰρ τὸ ἆθλον, καὶ ἡ ἐλπὶς μεγάλη—great is the prize and glorious the hope.'

SHOWELL ROGERS.

[1] 'On the Principle of Advocacy as developed in the Practice of the Bar,' Law Magazine, 1854, vol. xx. N. S. pp. 265–298. The article as there reprinted, and its authorship for the first time disclosed, is prefixed to a memoir of Mr. Justice Noon Talfourd shortly after his death (Ibid. 300). The article originally appeared anonymously in the Law Magazine, 1846, vol. iv, N. S. i.

[2] Phaedo 118 A.

VACARIUS ON MARRIAGE (TEXT)[1].

HIC INCIPIT QUEDAM SUMMA DE MATRIMONIO MAGISTRI VACARII.

[§ 1.] Duo sola sunt que audacem me semper faciunt ad scribendum, uidelicet communis utilitas et ueritatis amor. et quia scriptum est *Querite et inuenietis, pulsate et aperietur uobis*, hinc etenim illud peculiariter solet accidere mirandum, ut quod sciencia non habet id plerumque sollicitudo et studium querentis inueniat, sicut et mihi accidit in eo opusculo quod *de homine assumpto* scripsi. rem quippe arduam et mee paruitatis scienciam et uires ingenii mei excedentem, dono magis diuini muneris prosecutus sum. [§ 2.] Nunc quoque rem non minimam aggredior sed a pluribus quidem magistris attemptatam. a nullo uero reperi in aliquo expeditam, scilicet de coniunctione et dissolutione coniugii, que aliter a iure ciuili et longe aliter ab ecclesiastico iure disponuntur, quamuis eadem secundum utrumque ius sit matrimonii diffinitio. Est ergo res ista plurima diuersitate et difficultate confusa, et nube plena circa utrumque articulum, scilicet, copulationis et disiunctionis coniugii. que per magistrorum expositionem mihi magis turbata uidetur, tam rerum quam nominum ueritatem ipsam corrumpentium, tali proposita diuinatione[2], quod matrimonium aliud est iniciatum tantum, aliud iniciatum et consummatum et non ratum, aliud iniciatum et consummatum et ratum siue perfectum[3]. et, ut cetera interim omittam, iniciatum uolunt esse matrimonium in sponsalibus[4]. [§ 3.] Mihi autem uidetur id solum debere dici initiatum quod ita suis proprietatibus formatum est atque subnixum ut iam sufficiat ad id exequendum cuius respectu dicitur iniciatum. ita enim dicimus sacerdotem, uel misticum poculum, uel christianum iniciatum qui etiam fictus ad baptismum accessit. initium enim habet perfectum ex quo sequi potest effectus salutis. et ita in ceteris, et in matrimonio. res igitur ficti christiani[5] quantum ad initium perfecta est, si tantum perfecte sit iniciatus. respectu uero executionis est tantum inchoata. unde Augustinus de operibus vi. dierum ita scribit[6]: *Consummasse quippe ista intelligimus deum, cum creauit omnia simul ita perfecte ut nil ei in ordine temporum adhuc creandum esset, quod non hic ab eo creatum esset*:

[1] For Introduction, see LAW QUARTERLY REVIEW, No. L.
[2] *ditione* in text, but *diuinatione* in margin.
[3] dictum post c. 39, C. 27. q. 2; dictum post c. 17, C. 28. q. 1.
[4] dictum post c. 34, C. 27. q. 2.. [5] See c. 32 § 2, Dist. 4 de cons.
[6] Words to this effect are used by Augustin, de Genesi, lib. 9, cap. 1 (Migne, Patrol. vol. 34, col. 393).

inchoasse autem ut quod hic prefixerat causis post impleret effectis. Ita est et in omnibus aliis, ut iniciationis perfectio insit perfectioni executionis, eam scilicet generando. nam sicut ex perfecto sacerdocio est perfectum eius officium, sic ex perfecto coniugii iure perficitur eius officium et executio. Secundum hoc non recte dicitur matrimonium iniciatum nisi sit iure perfectum. Quando autem id fieri contingat inferius docebitur. Hec autem et alia plura me pulsando et inuitando ad scribendum induxerunt, ea tamen moderatione habita ut ex pluribus quas exequi proposui sentenciis nullam faciam meam dampnando alias, sed singulas prout occurrerint rationes et auctoritates probando uel improbando.

[§ 4.] *De matrimonio.* Cum ad humani generis propagationem institutum sit matrimonium, cumque uir et[1] mulier in carnis commixtione una caro fieri credantur, ideo putauerunt quidam etiam summorum pontificum in ipsa carnis commixtione constare matrimonium. quam remouere opinionem curauerunt periciores. Vnde Ambrosius: *Cum iniciatur coniugium, coniugii nomen asciscitur*[2]. quasi tunc et non postea. unde subicit: *Non defloratio uirginitatis facit matrimonium sed pactio coniugalis*, id est, qua uiro re ipsa coniungitur, non qua uiro promittitur. Hec interpretacio congruit diffinitioni coniugii[3]: *est enim coniugium coniunctio maris et femine indiuiduam consuetudinem uite continens.* Non itaque in carnis commixtione consistunt nuptie, nec in sponsalium conuencione, sicut alii quidam putant, in qua tantum spes est futuri matrimonii. quod ex sponsalium diffinitione manifestum est[4]: *Sponsalia uero sunt mentio et repromissio futurarum nuptiarum.* [§ 5.] Alius itaque contractus est sponsaliorum[5], alius nuptiarum, et omnino utriusque diuersa proprietas. nam sicut arrarum datio in sponsalibus fit et non in nuptiis, ita dotis datio et natura in nuptiis perficitur et non in sponsalibus. item in sponsalibus non uxor dicitur sed sponsa, in nuptiis non sponsa sed uxor uocatur. item in sponsalibus non etas attenditur[6], non domicilium, non presencia, sed solus sufficit consensus. in coniugio uero tam etas quam presentia uel domicilium desideratur. Alie sunt preterea proprietates quibus separantur nuptie a sponsalibus. inter uirum enim et uxorem, et non inter sponsum et sponsam, donationes sunt prohibite. [§ 6.] His ita respondetur: Secundum leges seculi ita distinguntur nuptie a sponsalibus et non ecclesiastico iure, secundum quod coniugium est animorum quedam spiritualis coniunctio que in sponsalibus quidem iniciatur, in carnali uero permixtione perficitur et consummatur[7]. Semel enim tantum contrahitur, scilicet in conuentione sponsali, et

[1] Omit *et* MS. [2] c. 5, C. 27. q. 2. [3] dict. ante c. 1, C. 27. q. 2; Inst. 1. 9. 1.
[4] Dig. 23. 1. 1. [5] Sic, MS.
[6] *attenditur* in margin; *attendendum* in text.
[7] c. 36 et § 1 dict. post c. 39, C. 27. q. 2.

postea in carnis commixtione ipsa eadem coniunctio confirmatur et perficitur, sicut in rerum societate contingit. eadem enim societas quantum ad obligationem contrahitur in coniunctione que postea in rerum collatione perficitur et consummatur. item in pactione donationis eadem iniciatur donatio quantum ad obligationem, que mox peragitur in rei traditione. eadem ratio est in personarum coniunctione, que in omnibus tam liberis quam seruis, non seculari sed ecclesiastico iure, spiritualiter disponitur, et in omnibus unam habet matrimonii legem, ut sicut ingenuus dimittere non potest semel coniugio copulatus, ita seruus non possit dimittere uel dimitti. Ecclesia namque neque in coniunctione neque in disiunctione matrimonii iuris ciuilis sequitur regulas, sed spiritualem magis quandam, ut diximus, obseruationem, ut in ipsa sponsione representetur sacramentum anime ad deum, ut sicut sponsus sponse tunc adiungitur per consensum, ita intelligatur anima iungi deo per dilectionem. Vnde Ambrosius [1]: *In omni matrimonio coniunctio intelligitur spiritualis quam confirmat et perficit coniunctorum permixtio* [2] *corporalis*, 'coniunctionem anime spiritualem unionem ad deum exaudiens, in carnis uero commixtione latet sacramentum Christi et ecclesie, ut quemadmodum cum uxore una caro efficitur, ita Christus cum ecclesia una caro [3] factus esse credatur in utero uirginali.' 'quia uero primum sacramentum uiolabile est (anima enim [4] que adheret [5] deo apostat ab eo) merito figura eius, scilicet desponsatio, etiam inter legitimas personas ex quibusdam causis irritatur. sacramentum uero ecclesie [6] omnino est irrumpibile, et ideo in carnis commixtione ita matrimonium radicatur ut nulla occasione utroque uiuente ualeat euerti [7].' Hec autem sentencia, scilicet, quod in sponsalibus matrimonium per animorum coniunctionem inicietur, in carnis commixtione perficiatur et confirmetur pluribus aliis auctoritatibus comprobatur. Unde Ieronymus super Abdiam [8]: *Qua propter in filiabus uestris fornicabuntur et sponse uestre adultere erunt. notandum est quod in filiabus dicit fornicationem futuram et in coniugiis adulteria, que sponsali conuentione iniciantur et commixtione corporali perficiuntur.* item Ysidorus [9]: *Coniuges uerius appellantur ab ipsa* [10] *desponsationis fide.* item Augustinus [11]: *Coniuges appellantur* [12] *ex prima desponsationis fide, quam concubitu non agnouerat, nec fuerat cogniturus, nec perierat, nec mendax manserat coniugis appellatio, ubi nec fuerat nec futura erat carnis*

[1] c. 36, C. 27. q. 2.
[2] *commixtio*, Friedb.
[3] *et una persona*, Rufinus.
[4] *frequenter enim anima*, Rufinus.
[5] *adhaeserat*, Rufinus.
[6] *Christi et ecclesiae*, Rufinus.
[7] *evelli*, Rufinus. The words within the inverted commas are almost exactly those of Rufinus, p. 391; but the passage is a little shortened. Compare also *Summa Coloniensis*, in Scheurl, Entwicklung des kirchlichen Eheschliessungsrechts, p. 167.
[8] c. 37, C. 27. q. 2.
[9] c. 6, C. 27. q. 2.
[10] *a prima*, Friedb. without variant.
[11] c. 9, C. 27. q. 2.
[12] *Coniunx uocatur*, Friedb.

ulla commixtio. [§ 7.] Sed contra hec querendum est, si in sponsalibus iam est iniciatum coniugium, qua ratione dicetur futurum. *sponsalia enim futuri sunt matrimonii*[1], id est, eius quod nondum est. ergo in sponsalibus iniciatum matrimonium non est, aut matrimonium iniciatum non est matrimonium. [§ 8.] His ita respondetur a quibusdam: 'qui iurat se accepturum aliquam, continuo matrimonium contrahit, quia ei in futura carnis copula indiuidue uite consuetudinem consentit[2].' Secundum quos propter solam carnis commixtionem matrimonium futurum dicitur, et non propter ipsam animorum coniunctionem et obligationem, que in sponsalibus iam contracta est, quemadmodum in aliis contractibus ut in rerum societate et donatione et similibus contingit. quamuis etenim quantum ad obligationem societas et donatio iam facte dicantur, adhuc tamen quantum ad rei perfectionem et traditionem future nominantur.

[§ 9.] Contra hec autem dicendum est quod in negotio societatis tota perficitur obligatio in pactione participandi lucri uel dampni, et ipsa eadem tota tollitur et perimitur in executione participati lucri et dampni. et donatio quoque tota in pactione contrahitur, et tota in rei traditione soluitur. eadem est ratio in similibus. At in personarum societate, id est in matrimonii negotio, duos contingit fieri contractus. primus contractus est sponsaliorum, in quo etiam extranei obligantur ut ipse persone principales se mutuo accipiant cum dote et propter nuptias donatione prescripta et nominata. secundus contractus est nuptiarum in quo principales dumtaxat tenentur ad reddendum carnale debitum. In aliis quoque negotiis simile repperitur, ut in eo qui promisit tibi quod res tuas reciperet custodiendas, easque in ea causa postea recepit. sicut enim iste antequam res acciperet ex promissione ad custodiendum non tenebatur sed ad recipiendum, in secundo uero contractu, id est, in recipiendo, dum ab obligatione recipiendi absoluitur, obligatur ad custodiendum: ita et in sponsalibus ad reddendum debitum non tenetur sponsus, sed ad recipiendam sponsam: in nuptiis uero, iam ad recipiendam eam obligatione sublata, ad debitum reddendum tenetur. [§ 10.] Aliquando tamen sine sponsalibus nuptie contrahuntur, ut accidit in Lya, que nequaquam fuit Iacob promissa, sed tradita[3]. non fuit ergo sponsa, sed uxor ratihabitione, non carnis commixtione. nam si ratihabitione Iacob Lya tradita, Rachelis soluta sunt sponsalia, sine dubio ea ratihabitione Lie nuptie sunt contracte etiam sine carnis commixtione, ut ita sit matrimonium absque sponsalibus et carnis commixtione. Secundum quod non

[1] Dig. 23. 1. 1: *Sponsalia sunt mentio et repromissio nuptiarum futurarum.*
[2] These words come from Rufinus, p. 393. But he has *futurum carnis copulam et individuae.*
[3] As to the case of Leah and Jacob, see C. 29. q. 1.

potest doceri quomodo in sponsalibus iniciari possit matrimonium, nisi ponatur *iniciari* pro quadam preparatione. Aut forte dicemus quod Ieronymus [1], sicut in alio huius rei articulo errauerit, ita et in hoc errare potuit. Potest etiam illud dici quod *sponsalem* eam conuentionem intellexerit que fit in traditione ipsa, in qua uterque profitetur se uelle alterum in coniugem habere. eadem uero fides que promittitur in sponsalibus de futura traditione exprimetur postea in ipsa traditione. ergo eadem dicitur et pactionis fides de futuro coniugio et fides consensus de presenti. et hec est illa fides, illa affectio que facit et format coniugium, ex qua secundum Ysidorum et Augustinum coniuges appellantur. *verius* inquit Ysidorus [2]: subaudi *quam ex concubitu.* cuius respectu, quia solet sequi, Augustinus [3] uocat eam *primam.* unde sequitur: *quam concubitu non agnouerat nec fuerat cognituras.* non ergo respectu secundo fidei dicitur prima, sed respectu concubitus, quia eam solet sequi. Hec itaque sufficiant acta cum illis qui putant in sponsalibus iniciatum esse coniugium.

[§ 11.] Deinceps cum illis negociemus qui per consensum de presenti coniugium rectius initiari dicunt. Putant autem quidam quod consensus ille de presenti sit coniunctio animorum illa de qua supra ita scripsit Ambrosius [4]: *In omni matrimonio coniunctio, etc.* Secundum istos sufficit consensum exprimere per uerba presentis temporis, hoc modo: *Habeo te et accipio in coniugem et habere perpetuo uolo.* qua ratione etiam inter absentes per nuntium uel per epistolam potest contrahi matrimonium. [§ 12.] Que sentencia tam naturali iuri quam ciuili uidetur contraria, ut sola uoluntate et animi destinatione absque omni traditione possit fieri tua, cum promissa dote, illa que absens est. cum dominium uel possessio non possit solo animo adquiri absque corporali apprehensione, saltem oculis et affectu. Quod autem corporalis etiam traditionis et quasi possessionis sit coniunctio matrimonii probatur in uerbo decreti, in quo agitur de fide pactionis et consensus [5], quibus uerbis diffinitur tunc esse fides consensus *quando corde et ore consentit ducere et unus alii consenciendo mutuo se suscipiunt* [6]. Ergo re, id est, mutua susceptione contrahitur coniugium. Et tamen consensu dicitur fieri, ut dictum est, quia consensu formatur. nam maris et femine coniunctio ex se naturalis est et communis omnium etiam animalium et informis. ex fide uero consensus formatur, aliquando in matrimonium, aliquando in concubinatum. nam etiam concubinatus nomen iuris est [7]. [§ 13.] Item quod tunc fiat uxor quando

[1] c. 37, C. 27. q. 2. [2] c. 6, c. q. [3] c. 9, c. q. [4] c. 36, c. q.
[5] c. 51, c. q. Palea. Augustinus de fide pactionis et consensus.
[6] *ducere et mutuo se concedunt unus alii, et mutuo se suscipiunt,* Friedb.
[7] Dig. 25. 7. 3 § 1: 'Concubinatus per leges nomen assumpsit.'

accipitur, ostendit Augustinus ita scribens[1]: *Noli timere accipere Mariam coniugem tuam. quo sermone sponsam coniugem nominat, quia futura erat coniux.* Sed quando erat hoc futura, nisi quando acciperetur? nam carnalis nulla futura erat commixtio. Sed dicet aliquis: Iam cohabitabant, quando ergo accepta est? quando scilicet uxoris affectione eam habere cepit. tunc uero quasi tradita in uxorem intelligitur, quia per cohabitationem eius habebat facultatem. [§ 14.] Sed Iohannes Os Aureum in ewangelio super Matheum his contradicere uidetur scribens[2]: *Noli timere accipere Mariam coniugem tuam, quo sermone sponsam simpliciter*[3] *indicauit.* Item in eadem omelia[4]: *Sicut enim illam postea commendat Christus ipse discipulo, sic etiam nunc angelus copulat sponso, non in fedus sollempne coniugii, sed in consortium communis habitaculi.* Item[5]: *Si enim cognouisset eam et loco uxoris habuisset, quomodo illam dominus quasi absque solatio discipulo commendaret, iubens illi ut eam reciperet in suam?* Item Ieronymus in eodem ewangelio[6]: *Genuit Ioseph uirum Marie: Cum 'uirum' audieris, suspicio tibi non subeat nuptiarum, sed recordare consuetudinis scripturarum quod sponsi uiri et sponse uocantur uxores.* Item Origenes in eodem[7]: *Inuenta est habens in utero: a beato Ioseph, qui, licet eam non contingeret, future tamen, ut putabatur*[8]*, uxoris omnia nouerat.* et infra: *Si tibi uxor nominatur, si in desponsatione tibi esse dicitur, non tamen uxor est, sed unigeniti dei mater eterna. Coniugem dico propterea, ut diabolo uirginitatem eius occultem, ut legis instituta non destruam. in sequentibus demonstrabo quod nec ista tua coniux secundum consuetudinem coniugii habeatur, nec iste qui generatur tuus filius esse credatur.* Item Gregorius in expositione ewangelii[9]: *Cum uero esset: Sic quippe discipulum post*[10] *resurrectionem suam dubitare permisit, sicut ante natiuitatem suam habere Mariam sponsum noluit, qui tamen ad eius nuptias non peruenit.*

[§ 15.] Manifeste uidentur hec aduersari uerbo Augustini[11], nam si secundum Iohannem inter eos *non fuit fedus sollempne coniugii*, secundum Ieronymum *non fuerunt nuptie*, secundum Origenem *non fuit uxor*, secundum Gregorium *non peruenit ad eius nuptias sponsus*, quomodo secundum Augustinum *non mendax manuit coniugis appellatio?* Qua ratione *ambo parentes* siue coniuges *sunt uocati*[12], nam secundum illos nullo uero modo ambo parentes uocati sunt? Sed notandum est quod etiam sibi ipsi quisque eorum discors aliqua ratione uideri potest, negando eam fuisse uxorem, cum illam fuisse sponsam omnes fateantur. Qua enim ratione

[1] § 2 dict. post c. 39, e. q.
[2] *similiter*, Friedb., with *simpliciter* as variant.
[3] c. 42, e. q.
[4] c. 42, e. q.
[5] c. 43, e. q.
[6] c. 40, e. q.
[7] c. 44, e. q.
[8] *putabat*, Friedb.; *putabatur*, ed. Rom.
[9] c. 45, e. q.
[10] Apparently *primo*, MS.
[11] c. 9, e. q.
[12] Ibid.

sponsa fuit, eadem procul dubio et uxor: cum indubie angelico monitu sponsalium fides et promissio impleta fuerit inter eos, eadem ergo ratione et matrimonium secutum est, et illa uxor facta probatur. Cum enim in sponsalibus promissio futuri matrimonii fiat, nisi matrimonium sequatur, ut promissum est, nec promissio inpleta dicetur. sed omnis inter eos iustissimos fides inpleta fuit. Qua ergo ratione promissa uel sponsa in sponsalibus prius fuit, eadem ratione in uxorem suscepta est postea, et uxor facta, secundum Augustinum [1], *non carne sed mente.* Nec tamen contra hoc illi senserunt, sed idem pocius, id est, quod uxor non fuit carne. Vnde Origenes [2]: *In sequentibus demonstrabo quod nec ista tua coniux secundum consuetudinem coniugii habeatur*, id est, secundum carnis propositum, sed secundum *legis instituta* ad custodiam et caste cohabitationis fidem pertinencia. Si [3] autem aliqua in supradictis discordia esse dicatur, quod diligencius intuenti uerius apparebit, ad illud Ysidori remedium recurrendum est ut illa ex dissonantibus sentenciis preferatur cuius antiquior et pocior extat auctoritas. [§ 16.] Ecclesiastica namque iura dissonas recipiunt sentencias et uarias formas, plerumque inutiles, quia non obseruantur, ut ecce: Sollempnem quandam nuptiarum formam instituit papa Evcaristius, quam obseruari precepit sub ea districtione ut, si aliter fieri presumerentur, non coniugia sed adulteria essent [4]. et ad confirmationem sue preceptionis eandem in fine, ut moris est, repeciit formam his uerbis: *Nisi uoluntas propria suffragauerit et uota succurrerint legitima*, que superius exposuerat de puella a parentibus et propinquioribus petenda et dotanda, et de ceteris que ibi continentur. Alii uero [5] non ad confirmationem eius preceptionis, sed magis ad eam infirmandam, dicunt in fine positam esse hanc adiectionem, ridiculosam facientes summi pontificis constitutionem, ut quasi quod perperam in inicio iusserat, confestim ductus penitencia mox in fine mutaret. Hec ita interpretantur ut querelam effugiant cuiusdam contrarietatis: nam alias dicitur matrimonium contrahi *solo consensu* [6], per hoc intelligentes parentum consensum et propinquorum, contra pietatem et equitatem tam naturalem quam ciuilem, excludi. Sed forte, ut supra dictum est, melius hoc dictum intelligitur ad excludendam opinionem eorum qui putant quod in carnis commixtione coniugium completur et perficiatur. nam secundum hanc sententiam non est infirmanda obseruatio constitutionis pape Evcharistii omni equitate plena et pietate, maxime cum generalis non sit ea constitutio sed specialiter ad eas pertinet puellas que in

[1] c. 9, c. q.
[2] c. 44, c. q.
[3] *Sed*, MS.
[4] c. 1, C. 30. q. 5.
[5] dict. post c. 8, c. q.; Pet. Lomb. Sentent., lib. iv. c. 28; Summa Rolandi, p. 151.
[6] c. 2, C. 27. q. 2.

potestate uel custodia parentum sunt constitute, non uidue sed uirgines bene custodite. Sicut etiam in decreto pape Leonis ostenditur quod sic incipit *Qualis debeat uxor esse*[1]. In nuptiis enim talium puellarum de naturali etiam ratione exigitur consensus parentum et propinquorum. quid enim iustius est quam ut consilio parentum et uoluntate huiusmodi puelle propter sexus fragilitatem consulatur, ne inconsulta facillitate et plerumque lubrico[2] etatis decepte in perniciem propriam et parentum dedecus turpissime nubant? Et ideo prouidus pater[3] ad roborandam preceptionis necessitatem ei penas subiecit, scilicet, ut adulteria essent si per iuris contumatiam aliter fierent. si uero per iuris ignorantiam aliter facta sint, adulterii quidem cessabit pena et crimen: culpa tamen non deerit fornicationis, nisi forte iusta causa nimie simplicitatis et ignorantie maritum excusare possit. quo casu, non adulterii, non fornicationis imminebit pena forsitan, nec tamen legitimum dicetur coniugium, sed simplex magis erit contubernium. Sic enim tam de ecclesiastico iure quam de ciuili interpretanda uidetur constitucio uiri utriusque iuris periti. In aliis uero puellis et mulieribus, que in custodia tali non sunt sed proprie potestatis sunt, et sui iuris, uel uidue, non exigitur ad earum coniugium uoluntas parentum ex iuris necessitate. Quod si forte etiam his puellis que in potestate sunt parentum, citra eorum consensum nubere, per aliquam forte summi pontificis constitutionem, permittatur, numquid ideo peruertenda est ueritas constitutionis pape Evcaristii, ut eam non preceptionem sed permissionem continere dicamus: quasi ius ecclesiasticum, quod cotidie cum ipso humano genere labitur et defluit, maxime circa ea que sunt moris et consuetudinis, contrarietatem recipere non possit? Illi enim qui ad hoc frustra laborant ut quamlibet passim contrarietatis discordiam reuocent ad concordiam, plerumque, ut uicium huiusmodi contra ueritatem euitare contendunt, in ueritate labuntur in peius, ut etiam in hoc casu. nam secundum eorum interpretacionem id quod non exigitur a lege sed tantum permittitur, ut pape Evcaristii forma et obseruatio, matrimonium facit esse *legitimum*[4], id uero quod a lege etiam exigitur, id est, sola nubentium uoluntas, matrimonium facit esse non *legitimum*. quod tale est ac si diceret heredis quidem institutio, numerus testium, subscriptiones et cetera que exiguntur, testamentum faciunt non legitimum, fidei commissa uero et legata et libertates et alia, que tantum permittuntur a lege, legitimum faciunt testamentum. Vtinam non aliorum sit hec sentencia quam illorum qui causa contrarietatis fugiende in eam

[1] c. 4, C. 30. q. 5.
[2] Sic, MS.
[3] Pope Evaristus.
[4] dict. post c. 17, C. 28. q. 1.

decurrunt! Sed hec de constitutione pape Evcaristii dicta sufficiant.

[§ 17.] Nunc ad propositam materiam reuertamur. Ex his itaque que sunt dicta uerius uidetur quod mutua quasi traditione re ipsa coniugium copuletur. Inquiramus autem an tunc etiam perficiatur. Et cum matrimonium ius tantum sit, nichil ei adici uidetur per concubitum, qui tantum facti est et non iuris. nam post[1] susceptam uxorem uir eius de iure plenam officii sui non male dicitur habere potestatem. cur ergo dicetur esse inperfectum quantum ad officium quod perfectum[2] habet etiam ante concubitum? [§ 18.] His tamen expressum[3] aduersari uidentur uerba Ambrosii predicta: *In omni matrimonio coniunctio etc.*[4] Sed attendendum est, quia dixerat Ambrosius quod *non defloratio uirginitatis facit matrimonium sed pactio coniugalis*[5], et ad id apercius demonstrandum adiecerat quod ex eo coniugium est[6] quod[7] uiro coniungitur non quod uiro miscetur. errare posset aliquis et ex hoc putare quod nulla ratione carnale commercium exigetur ad huiusmodi contractum perficiendum, ideo docet carnalem commixtionem ad matrimonium perficiendum pertinere. nam potestate quidem nature ad efficiendum exigitur. actu uero ad demonstrandum matrimonium perfectum desideratur. Si autem queratur quare permixtione carnali perfici coniugium dicat, cum per consensum perficiatur et formetur, nam forma rei perfectio est, sciendum est quod matrimonium, quamuis extra perfectum per iuris formam appareat, tamen cum per nature potestatem latere possit, ad demonstrandam nature perfectionem actus permixtionis est efficax. et ideo perficere dicitur quia perfectum esse demonstrat. Hec autem sententia generalis est sicut et ipsa uerba *In omni matrimonio*[8]. Alia uero expositio uerbis[9] uim facit, ea[10] restringendo ad illas personas quas uocant legitimas. Immo et ut ibi deficiat necessario contingit. uerbi gratia ponamus aliquem reliquisse concubinam suam ex quo cognouit eam alienam esse uxorem, et, marito eius postea defuncto, continuo eam duxisse uxorem. hoc matrimonium secundum eam sententiam confirmari non potest, quia per legitimam coniunctionem una caro fieri non possunt, quia iam per adulterium una caro facti sunt. et secundum hoc nullum matrimonium inter aliquos contractum, qui ante matrimonium carne mixti fuerint, ita poterit confirmari ut iura sacramenti habeat, quia una caro nequaquam legitima coniunctione fiunt qui ante facti sunt.

[1] Apparently *primo* in compendio, MS.
[2] Possibly *perfectionem*, MS.
[3] Sic, MS.
[4] c. 36, C. 27. q. 2.
[5] c. 5, e. q.
[6] Omit *est*, MS.
[7] *cum . . . cum*, not *quod . . . quod*, Decret.
[8] c. 36, e. q.
[9] *uerb'*, MS.
[10] *eas*, MS.

[§ 19.] Hac itaque ratione infirmari uidetur ea sentencia ut in carnis actu consistat coniugii sacramentum, maxime cum et beate Marie coniugium absque omni concubitu Christi et ecclesie legitur habuisse sacramentum. Quod autem id speciale sit in eo coniugio, ut quidam dicunt [1], et si credere possim, qua ratione id uerum sit uidere non possum, quia non persone meritum sed coniunctionis species et proprietas perficit sacramentum. Preterea quod non sit speciale in eo coniugio, sed in aliis etiam ante carnis commixtionem locum habeat tale sacramentum, ex decreto constat Ormisde pape in quo legitur *quod si quis alicui mulieri fidem dederit pactionis, id est, sponsalia contraxerit, si aliam postea duxerit, penitenciam agat de fide mentita et maneat cum illa quam duxit.* et rationem reddit: quia uidelicet *tantum sacramentum rescindi non potest* [2]. His ergo uerbis ostendit quod cum alia, quam postea duxit, perfectum fit sacramentum. vnde sequitur: *si autem fecerit fidem consensus cum priore, non licet ei aliam ducere, et si duxerit, dimittat ipsam et adherebit priori.* Fides autem consensus in superiori [3] parte eiusdem decreti diffinitur esse *quando mutuo unus alii consentiendo se suscipiunt.* In hac ergo fide, quia continet sacramentum, ita perficitur matrimonium ut, si postea duxerit aliam, dimittat eam. Sed hic itaque ductione magis quam commixtione carnis consistere uidetur tam coniugium quam eius sacramentum. [§ 20.] Nec huic sententie aduersantur forte uerba pape Alexandri [4]. non enim dixit 'nisi carnis commixtione una caro fiant,' sed *nisi maris et femine legitima coniunctione duo una caro fiant, nullum inter eos erit coniugii sacramentum.* sed coniunctio ista nichil aliud est quam matrimonium, id est, ius quo sic obligantur etiam ante concubitum ad inuicem, ut uir sui corporis potestatem non habeat sed mulier, et econtrario uir mulieris. Ipso ergo iure uiri corpus est mulieris, et corpus mulieris est uiri. Sed quid est utriusque corpus nisi caro? ergo utriusque caro alterius inuicem. et ita duo non commixtione carnali sed coniunctione legitima sunt una caro. [§ 21.] His tamen obici possunt illa Augustini uerba [5]: *Non est dubium illam mulierem non pertinere ad matrimonium cum qua docetur* [*non fuisse* [6]] *commixtio sexus,* et secundum papam Leonem [7] *cum qua docetur non fuisse nuptiale misterium.* ergo secundum Augustinum non sufficit prefata coniunctio nisi sequatur *commixtio sexus,* uel secundum papam Leonem *nuptiale misterium,* ut mulier *pertineat ad matrimonium.* Sibi itaque aduersari uidetur Augustinus,

[1] See Rufinus, p. 394: 'speciale priuilegium.'
[2] Apparently the Palea which stands as c. 51, C. 27. q. 2, and attributes itself to Augustin.
[3] No, in the lower part of the Palea, as it stands.
[4] A forged, but not Pseudo-Isidorian, decretal of Alexander, pope and martyr. It is found in the Collectio Lipsiensis; see Friedberg, Quinque Compilationes, 205.
[5] c. 16, C. 27. q. 2. [6] Omit MS. [7] c. 17, c. q.

cum alibi dicat matrimonium esse perfectum sine concubitu ut supra ostensum est. sed quia ibi dixerat[1] quod *mendax non manserat coniugis appellatio, quamuis futura non esset carnis ulla commixtio*, credere posset aliquis quod nulla ratione exigeretur commixtio talis. ideo asserendo dicit quod non aliter *pertinet* mulier *ad matrimonium* nisi sexus commixtio, id est, miscendi naturalis potestas, cum ea fuerit, quemadmodum illa non pertinet ad testamentum cum qua non est factio testamenti, id est, cum qua de iure non potest fieri testamentum. ergo sicut illa cum qua non est factio testamenti, et si in testamento heres instituatur, non pertinet ad testamentum, ita et illa cum qua non est uiro commixtio sexus, si ab eo ducatur in uxorem, ad eius non pertinet matrimonium uel ad nuptiale misterium. Si autem inter eos sit carnalis commixtio, quamuis nondum ad actum prodierit, et inter primos amplexus uiro diceret Augustinus: 'Noli frater sic eam tractare, quia nondum ad tuum pertinet matrimonium,'—nonne ille recte responderet: 'Inciuiliter loqueris Augustine, cum mea sit uxor ad hoc tradita mihi, ut eandem habeam plenitudinem potestatis tam in primo quam in ultimo amplexu.' [§ 22.] His autem apertissime aduersatur auctoritas cuiusdam decretalis epistole que sic incipit[2]: *Lex diuine constitutionis etc.*, cuius sola aduersancia uerba hic inserui, hec uidelicet: *Prothoplaustus ille radix et origo nostra detractam sibi costam uidens in mulierem formatam prophetico spiritu inter alia protulit: 'Propter hoc relinquet homo patrem et matrem et adherebit uxori etc.': quibus uerbis innuit*[3] *non aliter uirum esse et mulierem*[4] *nisi carnali copula sibi cohereant. qui ergo nequaquam mixtus est mulieri*[5] *federe nuptiali, quo pacto per unda sponsionis uerba possunt una caro fieri nullatenus ualemus intueri. propinquitas enim sanguinis uerbis dicitur non uerbis efficitur. sed neque osculum parit*[6] *propinquitatem, quia nullam facit sanguinis commixtionem.* Eadem ergo ratione neque fides consensus facit propinquitatem, id est, affinitatem, igitur nec matrimonium facit, quia nullam facit sanguinis commixtionem. Sola ergo commixtio carnis facit affinitatem uel propinquitatem, hoc est coniugium. [§ 23.] Huic sentencie omnes consentire uidentur qui extendunt sponsalia usque ad commixtionem. quia sponsalia concedunt esse futurarum nuptiarum, id est, earum que nondum sunt, et cum dicant tunc eas esse iniciatas, ignorantes sibi aduersantur, quum interim donec sponsalia secundum eos durant, omnino future sunt nuptie, id est, ante commixtionem, ut in ipsa carnis commixtione desinant esse future. ergo tunc demum esse incipiunt[7]. Ieronymus quoque in eam lapsus uidetur sentenciam.

[1] c. 9, c. q.
[2] c. 18, c. q. Palea.
[3] *innotuit*, Friedb.
[4] *uirum et mulierem posse fieri unam carnem*, Friedb.
[5] *extraneae mulieri*, Friedb.
[6] Omit *parit*, MS.
[7] *incipiunt*, MS.

sed hanc sententiam uero, ut [1] supra ostendimus, improbare uidentur periciores auctores ecclesie, docendo quod solo consensu fiat coniugium, dum se mutuo accipiunt. que sententia et rationi congruit et iuri ciuili.

[§ 24.] Hii uero qui usque ad concubitum sponsalia trahunt, plures enumerant casus quibus omnis coniunctio que fit ante carnis actum, secundum eos dissolui potest. Sunt autem hee: 'Desponsatio posterior carnis commixtione perfecta, spontanea alterius fornicatio, raptus [2], maleficium, melioris propositi electio, horrendi criminis perpetratio, alterius perpetua egritudo, captiuitatis continua detencio [3].' De his autem ea tractando persequamur que magis puto huic negotio expedire. [§ 25.] Primo itaque quando posterior desponsatio propter carnis commixtionem soluat priorem, inquirere possum, inuenire autem fateor me nescire. nam si prior sit sponsa, id est, promissa tantum non tradita, posterior uero etiam tradita, eo ipso quod ducta est, manere debet cum eo. prior uero remoueatur ex decreto Ormisde pape, et ipse de mentita fide penitenciam agat [4]. ex decreto tamen Sirii pape [5] tale matrimonium uidetur anathematizari, nisi forte ad factum tantum iniurie puniendum que prioribus sponsalibus facta est, et non ad ius matrimonii prohibendum respexerit papa. sicut prohibitio matrimonii cum uidua intra annum contracti ad iniuriam tantum pertinet commixtionis sanguinis dampnandam, et non ad ius matrimonii: et ideo ualet coniugium. Potest etiam illud dici quod de desponsata per fidem consensus papa Siricius questionem referat, que uxor etiam ante commixtionem fuit, et ideo secundum iuste dampnauit coniugium, ut ita commixtio nichil operetur in his casibus. [§ 26.] Si uero obiciatur auctoritas Ygnarii Remensis archiepiscopi [6], in qua ita scriptum est de his qui per sorciarias et maleficas impediuntur, quod *si forte sanari non poterunt separari ualebunt: sed postquam alias nuptias expetierint et illis in carne uiuentibus iuncte fuerint, prioribus quos reliquerant, et si possibilitas concumbendi eis reddita fuerit, reconciliari nequibunt.* Ex his uerbis non habetur quod propter carnalem commixtionem id accidat, ut prioribus quos relinquunt, dum alii uiuunt in carne, non possint reconciliari: sed ideo ad priores non possunt reuerti quum ab eis iure *separati*, perfecto cum aliis iure, ante carnis etiam commixtionem, iuncti sunt postea. Quid ergo si non curauerunt ante a prioribus separari quam aliis iungerentur? Certe, si prior coniunctio de iure ualebat, simul due coniunctiones erunt, scilicet, secunda ualet. quod quidem tam de iure ciuili quam

[1] Omit *ut*, MS.
[2] A stop, MS.
[3] Rufinus, p. 392.
[4] Apparently the Palea which appears as c. 51, C. 27. q. 2, and ascribes itself to Augustin.
[5] c. 50, C. 27. q. 2 (Siricius papa).
[6] c. 4, C. 33. q. 1 (Hincmar).

ex decreto Ormide[1] pape est impossibile, *quia secundam dimittet et adherebit priori.* quamuis duas sponsas quis habere possit, non tamen sine nota infamie. Nec his aduersatur Ygmari sentencia, que non uult ut priori possit adherere uel conciliari dum alius in carne uiuit, quia non fit hoc ex carnali commixtione, ut dictum est, secundi, sed propter diuorcium prioris coniugii, quod ex his uerbis colligitur, scilicet, *prioris quos reliquerant et a quibus separati fuerant*[2]. Hec dico secundum sentenciam Ygmari archiepiscopi. qui dicit eos posse separari. nam si prius matrimonium de iure ualuit et solutum non fuit, uel solui propter casum malefitii non debuit, secundum matrimonium de iure non tenuit. ergo uxor ex eo non fuit sed adultera. Sed an prius coniugium de iure ualuerit, etsi ex premissis possit intelligi, infra tamen apercius ostendetur. Item an propter huiusmodi alterius casum huiusmodi[3] coniugium post mutuam susceptionem debeat dissolui diligencius inquiram. Hoc plane dico quod priori coniugio per fidem consensus contracto de iure non potest preiudicium fieri per secundum. sed sponsalibus, in quibus fides tantum pactionis facta est, potest, absque omni repudio, postea preiudicari per fidem consensus, cessante etiam omni carnis commixtione in huiusmodi casibus. Ex sentencia itaque Ygmari archiepiscopi non inuenio quod prior desponsatio tollatur per carnalem confirmationem posterioris, siue fides pactionis siue fides contractus in posteriori desponsatione fuit. Hec sufficiant de soluenda desponsatione propter concubitum et de inpeditis per sortiarias.

[§ 27.] De confugientibus autem ad electionem melioris propositi scribit Evsebius papa his uerbis[4]: *Desponsatam puellam non licet parentibus alii uiro tradere, tamen licet sibi monasterium eligere.* non enim licet parentibus uel ipsi puelle contra fidem uenire pactionis, sicut dictum est in decreto Ormisde pape[5]. si tamen contra fidem predictam tradatur alii uiro, *cum eo manebit, et*[6] *ipsi de fide mentita agant penitenciam.* Quod si in sponsalibus contrahendis, non religio fidei, sed tantum arrarum datio forte interuenit, penam pacientur arrarum dumtaxat parentes puelle, si tamen prefatis sponsalibus, antequam secundo uiro traderetur, renunciauerint. si uero id non fecerunt, penam etiam infamie sustinebunt[7]. Si uero non alium uirum sed monasterium puella elegerit, nullo nec arrarum nec fidei dampno mulctabitur ipsa uel parentes eius. Vnde Gregorius in registro[8]: *Decreta legalia desponsatam si conuerti noluerit nullo omnino censuerunt dampno mulctari.* ergo nec fidei, nam qui ex iusta causa fidem deserit, eam non uidetur mentiri. vel dicemus non fuisse

[1] Apparently the Palea, c. 51, C. 27. q. 2.
[2] *huiusmodi* interlined, perhaps unnecessarily, MS.
[3] Not an exact quotation.
[4] c. 27, C. 27. 2.
[5] c. 51, c. q.
[6] Omit *et*, MS.
[7] Dig. 3. 2. 1.
[8] c. 28, c. q.

fidem promissam in hoc casu, quia lege excipitur. nam etiam sponsus puelle ita fidei sicut et arrarum obligationem potest remittere ut inpune etiam alii nubat. ergo inuito sponso puellam non licet alii uiro tradere inpune. licet autem sibi monasterium omnino sine pena. Ex aliis quoque causis super enumeratis sponsalia sine pena uidentur posse solui.

[§ 28.] Hec de soluendis sponsalibus sufficiant. Hoc tamen notandum est quod in dissolutione sponsalium persone ab obligatione *solui* dicuntur. quia tantum obligate sunt, priusquam uero se mutuo susceperunt in coniuges, quia tunc, cum[1] iuncti sunt, *separari* dicuntur. De his ergo uidetur dictum: *Quos deus coniunxit homo non separet*, ut *nisi ex causa fornicationis* separari non debeant. [§ 29.] Hic autem respondendum est quod de his quidem illud dominicum dictum est, sed tunc locum habet quando coniugium perfectum est per carnis commixtionem. [§ 30.] Sed contra hoc dici potest quod in ipsa tradicione, ut sepe dictum est, perficiatur coniugium. nam ubi uiro tradita est uxor, confestim sua facta est ut plenum habeat iam cognoscendi eam officium et potestatem, quemadmodum sacerdos legitime ordinatus et institutus in aliqua ecclesia minister[2], ex quo in eius possessione inductus est, integram et perfectam habet sui officii potestatem, ante etiam quam eam exerceat. Non enim ideo res aliqua exercenda est ut perficiatur, sed ideo perficienda ut exerceatur. ut episcopus, sacerdos, diaconus. item et ea que consistunt in facto ut domus, nauis, securis. omnia enim perficiuntur priusquam exerceantur, excepto matrimonio solo. [§ 31.] Ad hoc responderi potest quod in executione aliquando res perfici dicitur, que tamen quantum ad obligationem ante perfecta est. sicut legitur in titulo *Quod metus causa* his uerbis[3]: *Et quidem*[4] *aut inperfecta res est ut puta stipulationem numeratio non est secuta, aut perfecta si post stipulationem numeratio est facta.* stipulatio tamen ante numerationem quantum ad obligationem est perfecta. ergo et matrimonii perfectio alia est in obligatione, alia in solutione. sed sciendum est quod de negotio[5] uolentis per stipulationem puram exigere dicitur quod sit inperfecta res ante numerationem, non de stipulatione que perfecta est et consummata in ipsa uerborum conceptione, sicut iniuria iniqui iuris dicitur perfecta et consummata quando quis impetrauit ius iniquum, et si eo nunquam utatur. eadem ergo ratio locum habet in matrimonio. [§ 32.] Sed quamuis predicte rationes cogant fateri absque concubitu matrimonium esse perfectum, tamen illud preceptum dominicum in eo locum non habet ante concubitum, scilicet, *Quos deus coniunxit, etc.* quod ex

[1] Omit *cum*, MS.
[2] Dig. 4. 2. 9, § 3.
[3] *denegatio*, MS.
[4] *minist'*, MS.
[5] Probably *quidem*.

multis auctoritatibus et exemplis colligitur. unde Yeronymus ita scribit de adultera: *Immo cum illa unam carnem in aliam diuisit et se fornicatione a marito separauit, non debet teneri. ne uirum quoque sub maledicto faciat, dicente scriptura 'Qui tenet adulteram stultus et impius est*[1].' Cum ergo dicit *unam carnem diuidit*, ostendit ex una carne coniunctionem ipsam uim habere. item Gregorius: *Si igitur uir et uxor una caro sunt, et religionis causa dimittit uir uxorem, uel uxor uirum, que est ista conuersio in qua una et eadem caro ex parte transit ad continenciam et ex parte remanet in corruptione*[2]*? sed Achatius*[3] *precipuus inter heremitas, celebrato nuptiarum conuiuio, cum uespere thalamum esset ingressus ex urbe egrediens heremum elegit. item beatus Alexius ex nuptiis sponsam deseruit*[4]. ergo neuter istorum cum ea quam duxerat una caro factus fuit, et ideo continencie causa relinquere uxores licuit. [§ 33.] Sed respondendum est, ut supradiximus, quod in matrimonio coniunctio duorum in unam carnem magis fieri uidetur uinculo iuris quam opere carnis. alioquin et in concubinatu eadem erit ratio, ut non debeat una caro pro parte remanere in corruptione, pro parte ab ea transire, cum et ibi duo sint una caro. Sed dicet aliquis, 'Non sufficit opus carnis nisi procedat ex legitima coniunctione, sic enim scriptum est[5] *nisi legitima coniunctione duo una caro fiant.*' Quid ergo dicemus si cum tua concubina nuptias celebraueris? ea ratione relinquere eam poteris quia ex legitima coniunctione cum ea una caro esse non potes, utpote iam ante in concubinatu cum ea una caro factus. Si uero diuertere non potes iam illi adeo coniunctus, quid hoc facit nisi *confederatio nuptialis*, que, secundum Augustinum[6], nec etiam ex causa fornicationis, soluitur per divorcium. cuius confederationis sacramentum sine carnis commixtione in ipsa fidei obligatione et consensu perfici ex decreto Ormisde pape supra patet. Hoc ergo sacramentum etiam post diuorcium legitimum ita manet, sicut et ille retinet in se[7] sacramentum regenerationis qui propter crimen aliquod anathematis gladio precisus est ab ecclesie corpore cui iunctus fuerat, et inuitus magis uinculo dum iniciaretur, quam executionis opere aliquo dum Christiani officium prosequeretur. [§ 34.] Hanc autem rationem, id est, ut magis uinculum iuris in unum quoddam corpus plures iungat et uniat quam actus aliquis executionis, etiam in matrimonio locum habere cogit fateri matrimonium beate Marie Virginis. cuius sacramentum suo iunxerat marito ipsam uirginem integritate federis, non actione carnis. per quam actionem non obligantur in unum corpus aliqui, et si per eam unum[8] corpus aliqua ratione

[1] c. 2, C. 32. q. 1.
[2] *Macharius*, dict. post c. 26, e. q.
[3] Pseudo-Alexander; Friedberg, Quinque Compilationes, p. 205.
[4] dict. post c. 26, e. q.
[5] c. 19, C. 27. q. 2.
[6] c. 1, C. 32. q. 7.
[7] *uise* or *inse* as one word, MS.
[8] unus, MS.

fiant. Ex his credi potest quod matrimonii sacramentum insolubile fit magis iure ipsius federis quam executione carnali. [§ 35.] De Alexio et Achatio responderi potest quod non eorum exemplis iudicandum est sed legibus. aut, si aliud non appareat, dicet quis quod uxorum habuerunt assensum. quod uerisimilius est. aut forte sub lege fuerunt diuortii, que in ecclesia diu post tempora Iustiniani durauit.

[§ 36.] Sed et si dixerimus legem diuortii etiam hodie ante concubitum ex certis forte causis locum habere, num ideo dicendum est tunc matrimonium non esse *ratum*[1]? vnde procedit hec distinctio *rati* uel significatio, ut id demum debeat dici *ratum* quod non potest solui? Secundum hoc nullum coniugium, nec beate uirginis, in ueteri lege uel in ecclesia usque ad tempora Ivstiani[2] fuit ratum, eo excepto in ueteri lege qui puellam a se oppressam non desponsatam duxerat. nam solus ipse diuorcii legem amittebat propter uiolencie delictum. ea racione ex ipsius tantum parte ratum erat matrimonium, qui solus diuertere ab uxore non poterat. uero magis propter culpam quam propter iusticiam ratum fieret huiusmodi coniugium. Hoc autem absonum uidetur ut non iusticie proprio merito coniugium ratum uel non ratum dicatur, sed magis id penderat ex lege diuorcii. nam si iccirco aliquid dicitur ratum quia solui non potest, nullus contractus habebitur ratus, maxime societas, in qua nemo inuitus detinetur. sed nec etiam mandatum erit[3] ratum. male igitur comparabitur rati habitio, cum omne mandatum possit solui. item si id tantum ratum dicitur matrimonium quod solui nequeat uel irritum fieri, ea ratione nullum testamentum ratum erit, cum omne testamentum capitis diminutione possit irritum fieri. In toto autem corpore iuris id *ratum* esse dicitur quod de iure ualet, uel de iure probatur, et si solui possit, et eatenus habetur ratum quatenus ratum probatur. et id tantum quod est contra[4] legem non ratum esse dicitur. vnde pretor ait[5]: *Quod metus causa gestum est ratum non habeo.* quid hoc aliud de iure ratum haberi quam de iure probari? sic enim dicimus a me ratum haberi quod a me probatur. vnde Pomponius[6]: *Si negocium a te, quamuis male gestum, probauero*, id est, ratum habuero. et ideo sequitur: *Videndum ne in hoc dubio an ratum habeam*, id est, probem, etc. [§ 37.] Quare si ratum est matrimonium quia de iure ualet, ratum habendum est matrimonium etiam infidelium. quibus respondit dominus quod *non liceat uxorem dimittere*, et adiecit *Quos*

[1] dict. post c. 17, C. 28. q. 1. [2] Sic, MS. [3] *erit* repeated, MS.
[4] *quod eccontra* apparently, MS. [5] Dig. 4. 2. 1.
[6] Dig. 3. 5. 8 (9): 'Scaeuola libro primo quaestionum: Pomponius scribit, si negotium a te quamvis male gestum probavero, negotiorum tamen gestorum te mihi non teneri. videndum ergo ne in dubio hoc, an ratum habeam, actio negotiorum gestorum pendeat.'

deus coniunxit homo non separet. vnde papa Innocencius: *Ne putetur de his locutus esse qui post baptismum uxores sorciuntur, ideo et hoc a iudeis interrogatus*[1] *et eis responsum est*[2]. Quamuis ergo lege fori diuertere poterant, tamen lege poli non debeant *quos deus coniunxit.* et ideo ratum erat eorum matrimonium. nam secundum Augustinum illud matrimonium *non est ratum quod est sine deo*[3], id est, contra dei leges et precepta et inter fideles. *Sacramentum ergo coniugii,* ut ait Augustinus, *omnibus gentibus commune est. Sanctitas autem sacramenti non nisi in ciuitate dei nostri est et in monte sancto eius. Sacramenta enim ubicunque sunt ipsa sunt.* vnde Augustinus[4]: *Sanctitas sacramentorum in nullo peruerso uiolatur. constat enim eam etiam in his qui sunt scelerati inpollutam atque inuiolabilem permanere. et quod mali dicuntur eam polluere, quantum in ipsis est*[5], *cum illa inpolluta permaneant. sed in bonis permanet ad premium, in malis ad iudicium.* Sanctitas autem sacramenti duobus modis accipitur. sacramentum quippe est ipsum sacre rei signum. sanctitas uero sacramenti est eius uirtus, que in bonis tendit ad premium, in malis ad detrimentum. Secundum hanc significationem dixit Augustinus[6]: *Si non habuit Saul sacramenti sanctitatem, quid*[7] *in eo Dauid uerebatur*[8]. et infra: *Ecce Saul non habuit innocentiam, et tamen habuit sanctitatem, non uite sue sed et sacramenti dei.* Alio modo dicitur sanctitas sacramenti effectus sacramenti, id est, meritum quod eius uirtus in bono operatur. secundum hanc significationem dicit Augustinus sanctitatem sacramenti non esse nisi in ciuitate dei et in sancto eius. Virtus quoque corporalis medicine eadem in alio salutem secundum subiecti dispositionem in alio corruptionem facit. cum tam ipsa uirtus, quam eius effectus, sanitas dici possit medicine. [§ 38.] Cum itaque sacramentum habeat coniugium infidelium, quare non dicetur ratum et perfectum, cum perfectum dicatur quod ius et natura admittit? unde si alterum deest, inperfectum est, id est nullum, sicut inperfectum testamentum non est testamentum, ergo propter nature frigide inpedimentum deficit matrimonium. et ideo Gregorius de naturaliter frigido sic loquitur[9] *iste qui non potest uti ea pro uxore, habeat eam quasi sororem,* his uerbis aperte docens quod si[10] uxoris loco esse potest cum natura deficiat. Quid ergo si solus casus impediat, puta sortiarie maleficium? nichilominus perfectum est cui nichil deest de natura uel iure. quos enim natura non impedit perfecte ius, si adsit, obligare potest. [§ 39.] Ratio huiusmodi disputationis demonstrat perfectionem coniugii inter eos esse etiam qui per sorciarias impediuntur. Cum ergo

[1] *interrogatum,* Friedb.
[2] c. 1, C. 28. 1.
[3] dict. in prin. C. 28. 1.
[4] c. 97, § 7, C. 1. q. 1.
[5] Insert *dicitur,* MS.
[6] c. 87, § 6, C. 1. q. 1.
[7] *quod,* MS.
[8] Corr. *uenerabatur.*
[9] c. 2, C. 33. q. 1.
[10] Sic, MS. Corr. *non* (?).

secundum sentenciam Ygnari[1] dirimi possit tale coniugium, ratio inquirenda est cur id fieri possit. cum et illud constet eos non debere separari nisi ex causa fornicationis *quos deus coniunxit.* Secundum doctrinam itaque quorundam modernorum magistrorum tam ex maleficio quam ex aliis pluribus causis, ut supra ostendimus, coniuges ante concubitum possunt separari et aliis iungi, quia nondum sunt una caro facti. Hec tamen ratio ex legis alicuius uel auctoritatis uerbis non procedit, sed magis ex magistrorum interpretacione descendit: ex interpretacione uero Ambrosii super epistolam ad Corinthios[2]: *Et si uir non debeat dimittere uxorem, si tamen dimiserit, licet ei ducere aliam, et ideo* secundum Ambrosium *non subdidit de uiro apostolus quod de uxore premiserat*[3], *scilicet, quod aut reconcilietur aut sine nuptiis maneat.* Ex concilio uero apud Vermeriam[4] *is qui ex necessitate in aliam transierit prouinciam sine spe reuertendi, si uxor eius eum sequi noluerit, si se continere non potest, aliam cum penitencia ducat.* Quis dubitat contra ordinem iuris ecclesiastici fieri, et magis extraordinaria dispensatione ad id euitandum quod est deterius concedi? vnde sub conditione permittitur, scilicet, si continere se non poterit. item adicitur *cum penitencia*, quia sicut supra dixit Ambrosius, non debet uir uxorem dimittere ex ordine. et ideo si ex despensatione id faciat, ne fiat impune. Tales enim sunt testiculi Leuiathan, propter quos Moyses in ueteri lege ordinarium ius diuorcii fecit, ea uidelicet ratione ne deterius contingeret. Si ergo uel propter carnis commixtionem uel propter aliam probabilem rationem possit quidam uera interpretacione aliam inuenire regularem exceptionem dominice regule, qua generaliter precepit ne quis uxorem relinquat nisi ex causa fornicationis, que inuidia erit! Ea propter nullam ex propositis sentenciam eligere uolui quasi precipuam, nullamque declinare, nisi ratio aliqua se mihi offerens in aliam me extrahit partem, sine preiudicio tamen melioris sentencie, quam forte peritus lector poterit inuenire.

F. W. Maitland.

[1] c. 4, C. 33. q. 1. [2] c. 17, C. 32. q. 7. [3] *promiserat*, MS.
[4] c. 9, Decret. Vermer. a. 753 (Mon. Germ., Capitularia, ed. Boretius, i. 41).

LANDOWNERS' LIABILITY TO PAY RENTCHARGES IN FEE—AN ARGUMENT AGAINST THE DOCTRINE OF *THOMAS* v. *SYLVESTER*.

IN these days of depression in the value of agricultural land, when it is often found more profitable to abandon land than to cultivate it, the liability of a landowner to pay rentcharges issuing out of his land has become a very serious burden. We find accordingly that in several recent cases action has been taken by the owners of such rents to recover the amounts thereof as debts due to them from the owners of the lands charged. Such actions were all founded upon the decision given in the case of *Thomas* v. *Sylvester* [1], in which it was held that, since the abolition [2] of real and mixed actions to recover rent, a personal action, in the nature of the common law action of debt, lies during the continuance of a rentcharge *in fee* against the owner of the land out of which the rent issues. It is this doctrine which it is proposed to criticize; and in order to do so effectually, it is necessary, before examining the ground of decision in *Thomas* v. *Sylvester*, to consider the nature of a rent in fee and the terre-tenant's liability in respect thereof at common law.

At common law, all rents, whether rents service, rents charge or rents seck, were principally charges upon the lands out of which they issued. The creation of a rent in money gave rise to a *real obligation*, that is, to a duty of payment imposed upon the land, out of which the rent was to issue, just as if that land were a debtor [3]. Such payment, however, had necessarily to be made through the hand of the tenant of the land. It was he therefore who was principally affected by the exercise of the rent-owner's remedies. Thus in the case of rent service or rentcharge, the terre-tenant might be distrained to pay the rent: but that distress is in its original nature a coercive process against the land charged, to exact payment of the land, is, I think, shown by these facts:—First, all chattels found on the land may, as a rule, be distrained, irrespectively of their ownership; secondly, at common law chattels distrained for rent could never be sold, used or kept for use, but could only be

[1] 1873, L. R. 8 Q. B. 368.

[2] By Stat. 3 & 4 Will. c. 27, s. 36.

[3] It was plainly said that the land was the principal debtor; and to make a legal demand of rent it was necessary, if no person were found on the land, to demand the rent *of the land* as the debtor; Plowd. 70, 71; Co. Litt. 201 b; see also *Edrich's* case, 5 Rep. 118; Pollock & Maitland, Hist. Eng. Law, ii. 129, 130.

detained as a pledge for payment [1]; thirdly, the remedy of distress was available against the tenant of the land for the time being, no matter how he acquired possession of the land [2]; and fourthly, the tenant might be distrained to pay all arrears of the rent, whether incurred during his tenancy or before it [3]. Again, freehold rents were regarded as incorporeal things, and were recoverable, if actual seisin had ever been had of them by payment of some portion of the rent, in a real or mixed action [4]. Such an action was necessarily brought against the terre-tenant, that is, the tenant of the freehold for the time being [5]. But that the object of such actions was to realize a duty of payment imposed on the land appears from several considerations [6], but especially from the nature of the relief obtained therein. For the judgment and the execution had therein were not directed, in the first instance, to fixing the tenant with a personal liability to pay the rent and its arrears, or to realizing the amount of rent due by legal process against his chattels or lands. The plaintiff in an assize of rent was not adjudged to have possession of any corporeal thing; all he recovered was seisin of his rent, that is, the enjoyment of his charge on the land [7]. And the terre-tenant could not be adjudged personally liable to pay the rent and its arrears, nor could proceedings be taken to levy the amount due by execution against his chattels or lands; except (perhaps) if, after the rent had been so recovered, he contumaciously disregarded the judgment by continuing to withhold payment [8]. In the case of

[1] Co. Litt. 47; 3 Black. Comm. 6–14.

[2] Bract. fo. 263 b.

[3] *Edrich's* case, 5 Rep. 118.

[4] Litt. ss. 233–240; Co. Litt. 161 a.

[5] See Litt. ss. 495, 661; Co. Litt. 286 a, 349 b; 8 Rep. 151 b.

[6] As that a legal demand of the rent was necessary to create a cause of action by non-payment of the rent, the essence of such a demand being to make it on the land, and if no one were there, of the land; Litt. ss. 233–240, and Coke thereon; *Brediman's* case, 6 Rep. 56; *Maund's* case, 7 Rep. 28 b; *Cranley* v. *Kingswell*, Hob. 207; *Bishop* v. *Grant*, Cro. Eliz. 324; *Speccot* v. *Sheres*, ib. 828; *Smith* v. *Smith*, Cro. Car. 507; *Morrice* v. *Prince*, ib. 520. That all arrears could be recovered against the terre-tenant, including those incurred before the commencement of his tenancy; Y. B. 40 Edw. III. 24, pl. 25; 33 Hen. VI. 46, pl. 30 (Vin. Abr. Rent (Q. b) 1). And that an action to recover the rent would lie against the terre-tenant for the time being, no matter how he got possession of the land.

[7] It seems necessary to explain exactly what was the nature of the recovery had in an assize of rent, as so learned and acute a judge as the late Lord Bowen seems to have been under an entire misapprehension on this point; see *Christie* v. *Barker*, 53 L. J. Q. B. 537, 542, where he said that the plaintiff *was restored to the actual possession of the land until the rent was paid*. The plaintiff in such an action was entitled to the same judgment and writ of execution (*habere facias seisinam*) as in an assize of land: but in an assize of rent, 'the writ was executed by the Sheriff delivering to the plaintiff an ox or other chattel on the land, in lieu of execution; and in the case of a subsequent withholding of rent, the party aggrieved might have his writ of re-disseisin with all its consequences'; *Grant* v. *Ellis*, 9 M. & W. 113, 123. Re-disseisin would render the terre-tenant liable to imprisonment; Bract. fo. 236 b; 3 Black. Comm. 188; Pollock & Maitland, Hist. Eng. Law, ii. 44.

[8] The terre-tenant might be made personally liable for damages, if he were the disseisor, and for costs. But if the judgment for the recovery of the rent and its arrears were not intermixed with any judgment for damages and costs, an action of debt would not lie against the tenant on such judgment; see Y. B. 43 Edw. III. 2,

a rent in fee, moreover, the terre-tenant could never be made personally liable to pay by any other process than such as was given to punish his contempt of a judgment delivered in a real or mixed action to recover the rent. At common law, he could never be sued for the rent or any arrears thereof in an action of debt, not even after the rent had become extinguished by act of law. The reason for this, as Lord Coke points out, was that a rent in fee was 'all in the realty[1]'; that is to say, it was a purely real obligation—a mere duty of annual payment imposed on the land charged, the land being the only debtor. The creation of a rent in fee brought the terre-tenant under no personal obligation to pay the rent, either by reason of any contract or of his estate in the land[2]. It was no injury to the rent-owner that the terre-tenant applied the whole of the rents and profits of the land to his own use[3]. And mere non-payment of the rent by him was not an actionable wrong. If he simply left the rent unpaid, that was no cause of real action against him[4]. Still less was it any cause of action of debt or other personal action against him[5].

pl. 5 per Kirton. If a future payment of the rent were denied, the plaintiff's remedy was by writ of re-disseisin, as we have seen. If the judgment were disregarded by non-payment of the arrears, his proper course was by *Scire facias* to have execution on the judgment; Vin. Abr. Debt (N) pl. 12. It seems possible that the defendant would be personally liable on an adverse judgment in *Scire facias* so brought against him, and that he might be sued in debt on such a judgment; see Y. B. 43 Edw. III. 2, pl. 5, per Kirton; 4 Edw. IV. 50, pl. 10, per Littleton; Wray C.J., *Barnard and Tusser's* case, 4 Leon. 184, pl. 287. If so, one may conjecture that such a judgment would be enforceable by *ca. sa.*, *fi. fa.* or *elegit*. This point, however, is very obscure; and these writs cannot have issued upon the original judgment, when that was properly executed by a writ of *habere facias seisinam*; see 3 Black. Comm. Ch. 26, pp. 412 sq. As to *Scire facias* being the proper process to make the terre-tenant personally liable for the arrears of rent, see also Fitz. Abr. Scire facias, 100, 110, 130; Bro. Abr. Annuity 17; Vin. Abr. Execution (Q. a, 3), Scire facias (D, 1).

[1] *Ognel's* case, 4 Rep. 49. Coke says this of rent service in fee. But in the case of a rentcharge in fee, if the grantee elected to charge the person of the grantor (where he might do so) in a writ of annuity, the land was discharged of the rent, which thereupon became extinct; so that in this case also, the rent, as such, was all in the realty; see Fitz. Abr. Executors 71; Litt. ss. 219–221.

[2] In the case of rent service in fee the tenant could never be charged personally, either in a writ of annuity or in debt; Co. Litt. 144 a b, 145 a; Roll. Abr. 226 (Annuity, C); Bac. Abr. Rent (K) 2; 4 Rep. 49; Poph. 87. In the case of a rentcharge in fee the tenant could not be sued for the rent, as such, in annuity or debt; 4 Rep. 49; see previous note.

[3] This appears from the fact that if the owner of a rent in fee died leaving arrears of the rent unpaid, these arrears were lost at common law; 4 Rep. 48, 49; Co. Litt. 162 a. Stat. 32 Hen. VIII. c. 37, s. 1, gave the rent-owner's executors or administrators remedies for the recovery of such arrears by action of debt and by distress. But it was agreed, after this statute, that if the owner of a rent service or rentcharge in fee or for life granted over the rent, when arrears were due, these arrears were still lost; *Ognel's* case, 4 Rep. 50 b; *Dixon* v. *Harrison*, Vaughan, 36, 40, 41.

[4] There was no cause of action to recover a rentcharge or rent seck, simply by reason of non-payment, unless there were a *denial* of the rent, that is, non-payment after it had been legally demanded; see note 6 to p. 289, above. And even denial was no cause of disseisin of a rent service without rescous or resistance; Y. B. 40 Edw. III. 24, pl. 25; Co. Litt. 161 a.

[5] See note 2, above. In later times a remedy in equity was allowed against the

A difference existed in the case of rents for life, whether rent service reserved on a lease for life or rent granted for life; as arrears of such rents were recoverable, after the rent had ceased by the dropping of the life on which it depended, in an action of debt against the terre-tenant. The reason which Lord Coke gives for this distinction is that the creation of such rents amounts 'to a real contract in law, which realty, when the estate of freehold is determined, dissolves itself into personalty[1].' What he meant by this, as I understand, was that, on the creation of such rents there arose, not only a principal obligation of a real nature, charging the land, but also a secondary obligation (like that of a surety) charging the person of the terre-tenant, not as a matter of contract, but in respect of his tenancy of the land[2]. In such cases therefore it seems that there was a personal obligation on the terre-tenant to pay the rent, so that non-payment was a good cause of personal action against him. The remedy on this cause of action was however suspended, during the continuance of the freehold in the rent, because so long as the rent existed as a real thing, the personal obligation of the terre-tenant was eclipsed by the superior dignity of the freehold charge on the land[3]. But when the freehold ended, the personal obligation imposed as above mentioned still remained, though the real obligation, on the land, was dissolved. And the arrears (if any) became recoverable in an action of debt, not because a cause of action of debt then first accrued, but because on breach of the personal (and secondary) obligation a cause of action of debt had already arisen, and the remedy thereon was no longer blocked by the existence of the principal obligation on the land.

executors of a terre-tenant, who had omitted to keep down a rent charged on his land: but in granting this remedy it was expressly recognized that the terre-tenant was not liable to pay the rent at common law. Thus in *Eton College* v. *Beauchamp & Riggs* (Hil. 20 & 21 Car. II, 1 Ch. Cas. 121, cited as law in 2 Wms. Exors. Pt. IV. Bk. II, Ch. 1, Sect. 1, p. 1722, 7th ed.), where a bill in equity was filed by the grantee of a rent against the terre-tenant and the executor of a deceased terre-tenant, the executor was decreed to pay the arrears, so far as he had assets: but the reason given for this decision was that, *though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress*, yet for as much as the testatrix held the land and did not pay the rent, her personal estate was thereby augmented.

[1] *Oynel's* case, 4 Rep. 49 a; and see Fitz. Abr. Debt, 180.

[2] I think that this is well shown by Mountague C. J. in *Kidwelly* v. *Brand*, Plowd. 70, 71:—'If a man makes a lease for life or years, rendering rent at such a feast, and that if it be in arrear he shall enter, there the lessor ought to come to the land and demand the rent, or else he shall never enter, for the rent is only payable upon the land, and the land is the debtor, for in assize for the rent the land shall be put in view, and he shall distrain in the land for the rent, so that *the land is the principal debtor, and the person of the lessee is no debtor but in respect of the land.*'

[3] See Y. B. 19 Hen. VI. 28, 29, pl. 49, per Paston. Stat. 8 Anne c. 14, s. 4, enabled debt to be brought for arrears of rent reserved on a lease for life, during the continuance of the lease: but this Act did not apply to a rentcharge for life; *Webb* v. *Jiggs*, 4 M. & S. 113; 16 R. R. 408.

Lillingston's case[1] shows that the true reason why debt could be brought for the arrears of an extinguished life-rent is, that in such case a personal obligation to pay arises, not from personal contract, but in respect of the tenant's estate in the land. In that case a rent was granted to one for life out of a rectory with a proviso that the grant should not extend to charge the persons of the then tenants. It was held nevertheless that arrears of the rent might be recovered in debt against the tenants after the life had dropped; for it was determined that though the proviso prevented their persons being charged *in writ of annuity*[2], yet they were not exempt from the obligation of payment arising as above explained in *Ognel's* case, by real contract in respect of their estate in the rectory[3]. And this liability was illustrated by the following resolution:—'If a man grants a rentcharge for life out of his land, and the rent is behind and the grantor enfeoffs *A*; and the rent is behind in his time; and afterwards *A* enfeoffs *B*, and the rent is behind in his time; and afterwards the grantee dies, his executors shall have an action of debt against each of them for the rent behind in his time.' It is submitted that this resolution conclusively shows that during the continuance of a life-rent a personal obligation to pay is cast on the terre-tenant; and that breach of this obligation at once gives rise to a cause of action of debt, though the remedy in debt is suspended till the freehold in the rent is extinct. But as we have seen, in the case of a rent in fee, there was no similar personal obligation to pay; and the arrears were not recoverable in debt, after the rent had been extinguished, because non-payment by the terre-tenant was no breach of duty, no cause of personal action.

The law being as explained above, it was enacted in the Real Property Limitation Act, 1833[4], that no real or mixed action (except, principally, ejectment) should be brought after the year 1834. And in 1873, the action of *Thomas* v. *Sylvester*[5] was brought against a tenant of land subject to an annual rentcharge in fee created by one of his predecessors in title, alleging as the cause of action that all the estate of the creator of the rentcharge had vested in the defendant, but he did not pay the rent when due. As we have seen[6], the Court considered that the terre-tenant was personally liable to pay the rentcharge. This was decided on the supposition that the case was analogous to the recovery of arrears of a rent for life, after the life had dropped, in an action of debt at common law. The judges[7] based their decision upon the proposition that at common law debt would lie for the arrears of

[1] 7 Rep. 37. [2] See notes 1 and 2 to p. 289, above. [3] See ante, p. 291.
[4] Stat. 3 & 4 Will. IV. c. 27, s. 36. [5] L. R. 8 Q. B. 368.
[6] Ante, p. 288. [7] Blackburn, Quain and Archibald.

a freehold rentcharge (generally) when the freehold came to an end, as otherwise there would be no remedy. Although it is evident that they had *Ognel's*[1] case open before them, they did not advert to the distinction most plainly pointed out there between rents in fee and for life, or to the reason given by Lord Coke for allowing debt for arrears of an extinguished life-rent[2]. And it does not appear to have been brought to the notice of the Court that, at common law, debt could never lie for the arrears of a rent in fee, even after it had been extinguished by act of law[3].

In *Whitaker* v. *Forbes*[4], which was an action in the nature of debt by the executors of a devisee for life of a rent to recover arrears of the rent, Brett J. referred to *Thomas* v. *Sylvester* as 'an authority for saying that when the statute got rid of real and mixed actions *the same remedy* would lie for arrears of the rentcharge during the continuance of the estate' (*sc.* the freehold in the rent) 'as after its determination.' And Denman and Lindley JJ. also referred to *Thomas* v. *Sylvester* as an authority that an action of debt might be brought during the continuance of such a rent as had been created in *Whitaker* v. *Forbes*[5]. In the latter case however the rent was for life only, and again the judges seem to have been quite unaware that debt never lay to recover the arrears of a rent in fee, after the determination of the freehold estate in the rent.

In *Christie* v. *Barker*[6], where a rentcharge had been granted by a private Act of Parliament to a vicar and his successors, who were by the Act to have the same remedies as are given by law for the recovery of rent in arrear, the tenant of part of the lands charged was held personally liable to pay the whole of the arrears of the rentcharge upon the authority of *Thomas* v. *Sylvester*[7]. Brett M.R. expounded the doctrine of *Thomas* v. *Sylvester* at considerable length: but the sum of what he said was this:—When rent was payable to a freeholder's landlord, a debt became due to him from the tenant[8]; so long as the rent was recoverable in an assize, the inferior remedy of an action of debt was suspended; but debt was maintainable when the superior remedy no longer existed; *Thomas* v. *Sylvester* decided that, as the superior remedy had been taken away by statute, the inferior remedy was maintainable during the continuance of the freehold. Bowen L.J. laid down law to the same effect, saying[9], 'The rule at common law is that an action of debt

[1] 4 Rep. 48 b. [2] See pp. 291, 292, above. [3] See p. 290, above.
[4] L. R. 10 C. P. 583, affirmed 1 C. P. D. 51.
[5] L. R. 10 C. P. 583, 585. [6] 53 L. J. Q. B. 537.
[7] The same point had been previously decided in *Booth* v. *Smith*, 51 L. T. 395.
[8] As regards lord and tenant of a fee, the learned M. R. was entirely mistaken in this, as we have seen; ante, p. 290 and note 2.
[9] P. 542.

is merged in the higher remedy, but where the higher remedy is taken away, the action of debt still remains.' He also remarked [1] that if the rent-owner were aggrieved by the denial of the tenant of payment of the rentcharge, he had his remedy *not only against that person*, but also against the whole of the land out of which the rent issued. And both judges were apparently still quite unaware that debt was never maintainable at common law for the arrears of a rent in fee. Their decision that the tenant of part of the land was liable for arrears of the whole rent, seems to have been based on the considerations that the rent issued out of every part of the land, the Act gave the vicar the right to maintain such an assize of rent as was maintainable for rent *service*, and the remedy given by *Thomas* v. *Sylvester* was in lieu of this assize. But the Court overlooked the fact that mere denial of the rent was no cause of action to recover rent service [2]. And it is to be noted that according to the law laid down in *Brediman's* case [3], forasmuch as a rentcharge or a rent seck is against common right, in an assize thereof *all* the terre-tenants ought to be named as parties. So that the decision in *Christie* v. *Barker* is no authority for the proposition that an action of debt will lie, according to the doctrine of *Thomas* v. *Sylvester*, for the whole arrears of a *rentcharge* against the tenant of part only of the land, out of which the rent issues.

In re Blackburn, &c. Building Society, Ex parte Graham [4], Lord Esher M.R. explained that the liability imposed by the doctrine of *Thomas* v. *Sylvester* arose, not from contract, but as an incident of the terre-tenant's estate in the land, out of which the rent issued. As we have seen [5], this is consistent with the authorities respecting the terre-tenant's personal obligation to pay a life rent: but in the case of a rent in fee, there was no personal obligation arising in respect of the terre-tenant's estate and binding him to pay. In *Searle* v. *Cook* [6], *Pertwee* v. *Townsend* [7], and *Re Herbage Rents, Greenwich* [8], the rule in *Thomas* v. *Sylvester* was also applied, and the stock explanation of it repeated.

Now *Thomas* v. *Sylvester* may be good law, in so far as it decided that the terre-tenant is personally liable to pay a rent for life; because in the case of a rent for life, non-payment of the rent was

[1] P. 543. [2] Ante, p. 290, n. 4.

[3] 6 Rep. 58 b. F. N. B. 178 D, which was actually cited in *Christie* v. *Barker*, is to the same effect.

[4] 42 Ch. D. 343, 346. [5] Ante, pp. 290, 291, 292. [6] 43 Ch. D. 519.

[7] '96, 2 Q. B. 129. In this case, the tenant of land subject to a perpetual rentcharge was held personally liable to pay it, although the amount of the rent exceeded that of the income of the land. Collins J. said that the principle was involved in the decision of *Christie* v. *Barker*, but observe the distinction pointed out above as to the necessity of suing *all* the tenants of land subject to a rentcharge.

[8] '96, 2 Ch. 811. The decision was that only the freeholder, not a tenant for years, is liable under the doctrine of *Thomas* v. *Sylvester*.

a cause of action of debt at common law, and the remedy on this cause of action was merely suspended during the continuance of the freehold in the rent[1]. But as to the point actually decided therein, it is submitted that *Thomas* v. *Sylvester* is open to the criticism that the analogy relied on as the ground of decision wholly fails, non-payment of a rent in fee being no cause of action of debt at common law[2]. It appears, therefore, that in this case an action was held to lie, under the reformed procedure introduced by the Common Law Procedure Act, 1852, upon a state of facts which afforded no cause of action against the defendant at common law. Such a conclusion, however, seems to be inconsistent with the recent case of *Companhia de Moçambique* v. *British South Africa Co.*[3], in which the House of Lords held that the English Courts have no jurisdiction, under the Judicature Acts of 1873 to 1875, to entertain an action for trespass to land beyond the seas, because such a trespass gave rise to no cause of action at common law[4]. It was there plainly laid down that the test of obtaining relief in our present Courts of Justice, now that the old formal actions have been abolished, is whether the plaintiff has a good cause of action. In *Thomas* v. *Sylvester*, it has been shown that the plaintiff had no cause of personal action. And he could have no cause of real or mixed action because such remedies for the recovery of rent had been expressly abolished by statute without any saving[5]. On what ground then could he be liable? It does not appear sufficient to say that otherwise there would be no remedy. When a statute takes away an action, the liability is removed. Acts which before were actionable no longer constitute a cause of action; a state of facts that formerly gave rise to an obligation is not now productive of any legal bond. It is therefore submitted that the Courts have no jurisdiction to impose directly, under the present procedure, that personal liability to pay a rent in fee, which at common law could only be fixed on the terre-tenant (if at all) in case of his contempt of the judgment in a real or mixed action to recover the rent[6]; as it is exactly that liability which the Act of Will. IV removed[7].

[1] See ante, p. 291. [2] Ante, p. 290. [3] '93, A. C. 602.

[4] The plaintiffs urged that the abolition of venue by the Judicature Acts rendered such an action maintainable, but the Court held that, as regards land beyond the seas, the common law rule requiring the venue to be local in trespass *qu. cl. fr.* was substantive and not merely procedural.

[5] By Stat. 3 & 4 Will. IV. c. 27, s. 36, all real and mixed actions were abolished, except writ of right of dower, writ of dower *unde nihil habet*, *quare impedit*, and ejectment. But ejectment could never be brought to recover a rent; Cro. Car. 492; 3 Black. Comm. 296; 2 Tidd's Practice, 1193, 9th ed.; Cole on Ejectment, 91.

[6] See ante, p. 289, notes 7, 8.

[7] To put a parallel case:—By the Statute of Gloucester, 6 Edw. I. c. 5, waste by a tenant for life was a cause of forfeiture of the place wasted in case a writ of waste were issued against him. Afterwards a tenant for life was held to be liable in

Besides, it is not true that, if a rent-owner could not have an action of debt against the terre-tenant, he would be left without remedy, after the abolition of real and mixed actions. In the first place, since rent seek may be distrained for, all rents are recoverable by distress; and distress has always been considered to be a rent-owner's most important and effective remedy[1]. Secondly, there is a long established jurisdiction to sue in equity for the recovery of rent as being a legal charge on the land out of which it issues[2]. It is true that such relief was originally granted in cases of accidental inability to enforce the legal remedies for recovery of the rent, as where the rent-owner had lost his title-deeds or the lands charged could not be ascertained; and it was considered that the jurisdiction was not exercisable if the rent-owner had an effectual remedy by action at law[3]. But if the remedy at law be taken away, then the rent-owner's case would seem to fall within the principle upon which the equitable relief was extended[4].

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damages for waste in an action on the case; 2 Wms. Saund. 252, n. (7). This duplicate liability continued until 1833, when the writ of waste was abolished by Stat. 3 & 4 Will. IV. c. 27, s. 36; see 3 Steph. Comm. 532, n. (*p*), 6th ed. Could it be seriously argued that the Courts have jurisdiction, since that enactment, to impose in any form of proceeding the liability to forfeiture for waste, which could only be enforced before by suing out a writ of waste?

[1] This is apparent from the fact that there could be no disseisin of rent service, without some act, which hindered the lord in distraining, or impeached his title; Litt. ss. 237, 240; Co. Litt. 160 b; ante, p. 290, n. 4. Littleton (ss. 213 sq.) treats distress as the all-important remedy, and only mentions the actions to recover rent in connexion with rent *seek* (ss. 233-6). After the passing of the Statutes (2 W. & M. c. 5; 4 Geo. II. c. 28, s. 5) which authorized the sale of distrained chattels and allowed distress for rent seek, the necessity for real or mixed actions to recover rent was almost entirely removed. Blackstone, writing in 1765 (Comm. iii. 232, 1st ed.) says that an assize of rent is now seldom heard of, and all other real actions to recover rent are entirely disused. The Real Property Commissioners (1st Rep. pp. 40, 42), in recommending the abolition of real and mixed actions generally, said that they had made diligent inquiry into the practical operation of these remedies. They came to the conclusion that such actions had quite gone out of use, except for fraudulent purposes. The only express mention of rents in the learned Commissioners' first report is the recommendation (p. 50) that limitation as to rents should be assimilated to the limitation of actions for the land itself. It is curious that they should have overlooked the fact that they proposed to abolish the only actions to recover rent; see n. 7 to p. 289, above.

[2] See Moore 626, pl. 859; ib. 805, pl. 1092; *Zouch* v. *Siddenham*, Cary 131; *Boteler* v. *Massey*, Finch 241; *Busby* v. *Earl of Salisbury*, Finch 256 (note the disregard of the plea of purchase for value without notice in this and the preceding case); *Thorndike* v. *Allington*, 1 Ch. Ca. 79; *Collet* v. *Jacques*, 1 Ch. Ca. 120; *Boreman* v. *Yeat*, 1 Ch. Ca. 145; *Cocks* v. *Foley*, 1 Vern. 359; *Duke of Leeds* v. *Powell*, 1 Ves. Sen. 171, 172, and Supplement 98; *Duke of Bridgwater* v. *Edwards*, 6 Bro. P. C. 368; *Duke of Leeds* v. *Corporation of New Radnor*, 2 Bro. C. C. 338, 518; *Cupit* v. *Jackson*, 13 Price 721, 733, 28 R. R. 735; *Searle* v. *Cook*, 43 Ch. D. 519, 528.

[3] See *Palmer* v. *Whittenhal*, 1 Ch. Ca. 184; *Holder* v. *Chambury*, 3 P. Wms. 255; *Duke of Leeds* v. *Powell*, 1 Ves. Sen. 171, 172; *Bouverie* v. *Prentice*, 1 Bro. C. C. 200; *Cupit* v. *Jackson*, 13 Pri. 731, 28 R. R. 735.

[4] When the recovery of a rent is sued for in equity, the terre-tenant may be decreed personally to pay the rent and its arrears, if he claim to keep the land; see *Zouch* v. *Siddenham*, *Boteler* v. *Massey*, *Busby* v. *Salisbury*, *Leeds* v. *Powell*, *Leeds* v. *New*

Radnor cited above. It is submitted that this liability is to be referred to the simple principle that, if the owner of land charged with the payment of money wish to keep the land, he must pay the money; and that the equitable liability of a terre-tenant subject to a rent in fee is exactly parallel to that of one, who has succeeded to land subject to a mortgage debt, which he is not personally liable to pay. In this case the landowner cannot be sued for the debt at law, but if he wish to avoid foreclosure, he must pay out of his own pocket all that is due. This principle will explain why a tenant sued in equity for rent may be decreed to pay the rent and all the arrears, irrespectively of the amount of the income of the land; see *Leeds* v. *Powell*, ubi sup. It is submitted that if the tenant be under no personal liability to pay the rent *at law*, he may escape this equitable liability to pay by abandoning the land. This would be no injury to the rent-owner, as it is also in the discretion of a court of equity to order the arrears of a rentcharge to be raised by sale or mortgage of the land out of which it issues; *Cupit* v. *Jackson*, 13 Pri. 721, 733, 28 R. R. 735; *Hambro* v. *Hambro*, '94, 2 Ch. 564.

HAS SECTION 4 OF THE SALE OF GOODS ACT MADE ANY CHANGE IN THE LAW?

THE question whether apart from their special subject-matter there was any difference between the 4th and 17th sections of the Statute of Frauds is one which, since the passing of the Sale of Goods Act, section 4, has become to a great extent merely of historical importance in England. It is, however, still a practical question in British Colonies where these sections of the Statute of Frauds are in force, though the Sale of Goods Act has not yet been adopted. It is obvious, too, if any distinction did exist, that section 4 of the Sale of Goods Act, which has avowedly abolished such distinction, is responsible for a change in the law, and that in this aspect the matter is still of some practical interest, even in England. I propose to submit, with the utmost deference to the high authorities who framed the Sale of Goods Act, section 4, and who apparently did not intend to bring about any such change, that such a distinction did exist and that such a change has been made. It may be well at the outset to point out very shortly the various views which have been enunciated from time to time on the subject. At one time it seems to have been thought that the provisions of both sections went to the existence of the contract. *Carrington* v. *Roots*, 2 M. & W. 248. This view has long been abandoned and it is unnecessary further to refer to it. Then until very recently judges and text-writers seem to have concurred in the opinion that section 17 went to the existence of the contract, while section 4 was merely procedural. It is sufficient to refer to the case of *Leroux* v. *Brown*, 12 C. B. 801, though strangely enough the same construction is again asserted as late as 1887 by Kay J. *In re Roberts*, 36 Ch. D. 196. This view has in its turn been rejected, and though reasons have not been given they are not difficult to find. In the first place section 17 does not provide that the contract shall not be good, but merely that it 'shall not be allowed to be good,' that is, shall not be so allowed by the Court at the trial or hearing. Again, the contract itself did not need to be in writing, it was sufficient, when the time came for allowing it good or otherwise, that a note or memorandum had been in existence at the commencement of the action. The preamble to the statute also leads one to the conclusion that it was only designed to affect

procedure or evidence, unless a contrary intention was clearly shown. The same judges who rejected the above view put forward a third, namely, that the 17th section dealt with procedure simply, that there was absolutely no distinction on this point between the two sections, and that the true construction of the 4th and 17th sections is not to render the contract under them void, still less illegal, but is to render the kind of evidence required indispensable *where it is sought to enforce the contract;* per Lord Blackburn in *Maddison* v. *Alderson*, 8 App. Ca. 488, per Brett L.J. in *Britain* v. *Rossiter*, 11 Q. B. D. 127, and per Bowen L.J. in *Lucas* v. *Dixon*, 22 Q. B. D. 360, and in *Hugill* v. *Hasker*, 22 Q. B. D. 371. It is remarkable that in England no case arose in which the exact point was expressly raised and decided, for the remarks in the above cases are *dicta* merely. I propose afterwards to refer to a decision of the Full Court in Victoria, which goes the whole length indicated by these *dicta*. It is with the utmost diffidence that I propose to submit reasons—reasons, however, founded on previous decisions of the Courts—why in one respect, and in one respect only, these *dicta* are incorrect. I think there was a distinction between the two sections—a distinction indicated by the opening words of the sections—namely, that while the 4th section applied only to cases where substantially an action was being brought on the contract against a party to the contract as defendant, the 17th section, though like the 4th merely procedural, applied to all cases where the contract for the sale of goods over the value of £10 came into question in legal proceedings in any cause or matter, and not only to cases where, to use the words of Lord Blackburn, 'it was sought to enforce the contract.' In other words, while the 4th section was merely a weapon of defence in the hands of a defendant, a party to the contract, the 17th section was available not only to such a defendant but to a defendant not fulfilling such conditions, and to a plaintiff, without regard to the question whether such plaintiff or defendant was a party to the contract. The expression, 'no action shall be bought . . . unless the agreement upon which such action shall be brought or some note or memorandum thereof be in writing, &c.,' and the expression, 'No contract shall be allowed to be good . . . unless some note or memorandum thereof be in writing, &c.,' exactly indicate this distinction; and when we find them occurring in the same statute, even after allowance is made for the careless drafting of the time, one is almost irresistibly led to the conclusion that the framers of the Statute of Frauds intentionally introduced this change of language. It is worthy of note, too, without insisting too much on its importance, that a variance in the language at the ends of the sections seems to support this conclusion. The 4th

section has the words, 'Signed by the *party* to be charged *therewith* or *his* agent, &c.,' which from the context is taken to refer to the defendant or the agent of the defendant in the action which is brought. The 17th section, on the other hand, has '*made* and signed by the *parties* to be charged *by such contract* or *their* agents, &c.,' which (even though the word 'made' is treated as superfluous and not as meaning 'made by the parties') seems to show that a document or documents signed, not necessarily by the defendant in an action, but signed by both the parties under an obligation by the contract, is required before the contract is allowed to be good. Where, as is usually the case, the parties to the contract are the parties to the action and the plaintiff has a note or memorandum signed by the defendant, there is no difficulty in his supplying one signed by himself or his agent even if his writ of summons would not itself be taken as a memorandum signed by himself or his agent within the meaning of the section. But if, as I think, the 17th section is of importance in cases other than actions between the parties to the contract, it would be necessary for the plaintiff to produce a document or documents signed by both parties or their agents, and such was, I submit, the intention of the legislature founded on the distinction which was designedly drawn between the sections. I am aware that in Benjamin on Sales it is stated as well settled that the word 'parties' in the 17th section means the same as the word '*party*' in the 4th section, and it must be admitted that there are authorities to support that view, but only one of them, *Allen* v. *Bennett*, 3 Taunt. 169, 12 R. R. 633, is a direct decision on the point in question, the others are either decisions under the 4th section or the point was not taken. The case of *Allen* v. *Bennett* is not entirely satisfactory, being partly based on the exploded doctrine of moral obligation to which Lord Mansfield was so partial. In recent years the point seems to be treated as settled, and (as I have above indicated) in the ordinary case, where the parties to the contract were the parties to the action, was of little or no importance.

It is possible to suggest a reason why the framers of the Statute of Frauds might have wished to draw the distinction between the sections which is suggested in this paper. The 4th section did not deal—at any rate directly—with conveyance as well as contract, whereas the 17th section did, so that in the one case the question of property arose, while in the other it did not. The contract of sale of goods in English law is peculiar; it is often a conveyance as well as a contract, and the property in the goods may pass by the contract itself if such be the intention of the parties. It may well be that the legislature intended that until one of the require-

ments of the 17th section had been complied with any person interested in any legal proceeding might take advantage of its provisions for the purpose of supporting a contention that in the case of a verbal contract of sale wholly unperformed the ownership of the goods remained in the vendor. The words, 'No contract shall be allowed to be good,' seem to exactly carry out this intention. It would be idle, however, to endeavour to support a particular construction of these sections without some consideration of the very numerous authorities under them, and I propose therefore to examine some cases bearing on the subject. It is stated in the notes to *Birkmyr* v. *Darnell*, 1 Smith's Leading Cases at p. 301, that a stranger can take advantage of the Statute of Frauds, apparently intending to refer to both the 4th and 17th sections. It is remarkable that though the notes are to a case under the 4th section, the authorities cited, namely—*Coombs* v. *Bristol and Exeter Railway Company*, 3 H. & N. 510; *Stockdale* v. *Dunlop*, 6 M. & W. 224; *Coates* v. *Chaplain*, 3 Q. B. 483; *Felthouse* v. *Bindley*, 31 L. J. C. P. 204; *Sykes* v. *Dixon*, 9 A. & E. 693, and *Banks* v. *Crossland*, L. R. 10 Q. B. 97, are all except the last two under the 17th section, and that these two, which are under the 4th section, do not on examination bear out the statement in the note. In *Sykes* v. *Dixon* the decision was that the promises were all on one side, that there was no mutuality, or practically that there was no agreement at all based on consideration. The decision in *Banks* v. *Crossland* only went to show that where an action could not be brought on account of the provisions of the 4th section, a criminal proceeding would not lie. If my conclusion as to the construction of the sections be correct, it follows that a stranger might take advantage of the 17th section, whereas it is difficult to see under the 4th section how the party to be charged, that is the defendant, who is or should be also a signatory to the contract, can be a stranger to the contract; and this view is borne out by the remarks of North J. in *Miles* v. *New Zealand Alford Estate Company*, 32 Ch. D. 279. Again, in Leake, Law of Contracts, 3rd edition, pp. 32, 260, 261, it is stated on the authority of the above and other cases under the 17th section, that 'A contract for the sale of goods which does not satisfy any of the requirements of the 17th section is not effectual to pass the property in the goods'; and this was so even though the section was relied on by a person not a party to the contract. It would perhaps be more accurate to say that such an agreement would not be allowed to be good for the purpose of passing the property in the goods against a person relying on the 17th section; but with this correction the principle seemed to extend to cases where no action was being

brought on the contract. It is no doubt true that in some of these cases the judges were influenced by the view taken in *Leroux* v. *Brown*, but even allowing for this the principles seemed well settled. It is submitted that the statements in the notes to *Birkmyr* v. *Darnell*, and in Mr. Leake's work, are reconcilable with the construction of the 17th section suggested above, and are not reconcilable with the view that there is no distinction between the sections. It seems plain, too, that the passing of the Sale of Goods Act has made these cases under the 17th section no longer law.

It may be convenient at this stage, for the purpose of illustrating my contention, to refer to the decision of the Full Court in Victoria in the case of *Williamson* v. *Tait*, 18 Victorian Law Reports, 649. The facts so far as material are as follows:—the plaintiff, the mortgagee of chattels with a power of sale in default of payment (the mortgagor having made default), entered into a verbal agreement with a third party to sell the chattels to such third party at a certain price. After such agreement, but before any of the requirements of the 17th section had been complied with, the mortgagor, the defendant, tendered in full all the money due under the mortgage and claimed redemption. The mortgagee refused to accept the money, saying the goods were sold. To secure the mortgage debt the defendant had also given a bond to the plaintiff who brought this action on the bond. Defendant pleaded the tender and refusal to accept it. The agreement to sell the goods ultimately fell through, by no fault of the plaintiff, but by the fault of the mortgagor. The majority of the Court, Higinbotham C.J. and Hood J., decided that there was absolutely no difference between the 4th and 17th sections, that the defendant a stranger to the contract could not take advantage of the 17th section, and that the property in the goods, which were ascertained and specific, had passed to the purchaser, and was in him at the time of the tender. a'Beckett J. dissenting held that there was no enforceable contract between the plaintiff and the third party, that the plaintiff as mortgagee was to some extent in the position of a trustee, and that it was his duty to accept the tender so long as he was not bound by an enforceable contract. The authorities referred to above in Smith and Leake were not dealt with by the Court. This decision is of course directly opposed to the contention put forward in this paper, which would have permitted the defendant, though not a party to the agreement for sale of the goods, to rely on the 17th section and to say that the agreement should not be allowed to be good.

Another class of cases which I think illustrates and supports

my argument is that of which *Noble* v. *Ward*, L. R. 2 Ex. 135, may be taken as a typical example. These are cases in which it is alleged or contended by the defendant that a contract originally in writing, and complying with the requirements of the Statute, has been discharged by a substituted contract which cannot be enforced because it is merely verbal and unperformed. The cases will be found collected in Leake, Law of Contracts, 689-691. It will be found that in many of the cases cited, the Court did not really decide the question by reason of an adverse decision to the defendant on the point whether there was in fact a substituted contract, or merely a gratuitous or voluntary forbearance on the part of the plaintiff, as, for example, where the plaintiff agreed at the request of the buyer of goods, the defendant, to postpone the delivery of the goods. *Hickman* v. *Haynes*, L. R. 10 C. P. 606. In other cases the defendant was defeated on the ground that he was seeking by parol evidence not to discharge but to add to or vary a written contract. On the other hand it is evident that whichever view of the 17th section be correct, the plaintiff who makes a parol variation part of his case must fail either under the 4th or 17th sections. *Goss* v. *Lord Nugent*, 5 B. & Ad. 65, under the 4th section; *Plevins* v. *Dowling*, 1 C. P. D. 225, under the 17th section. Dismissing these cases from our consideration, suppose the Court was satisfied that there had been in fact a substituted agreement made verbally and not in any way performed, and the defendant, the plaintiff relying on the statute, sought to take advantage of the parol discharge. Could he have done so? If the view taken in this paper be correct, the answer would be in the affirmative under the 4th section, and in the negative under the 17th section. It seems clear under the 4th section that if the defendant is not bringing any action or seeking to enforce the parol agreement, the plaintiff cannot rely on the fact that it is not in writing. The cases show that a plaintiff never can rely on the 4th section, which is a weapon of defence not of offence, per Lord Selborne in *Hussey* v. *Horne Payne*, 4 App. Ca. 323, and per North J. in *Miles* v. *New Zealand Alford Estate Company*, 32 Ch. D. 279—I know of no *decision* to the contrary except the case of *Stowell* v. *Robinson*, 3 Bing. N. C. 928. This decision is certainly not supported by the authorities cited in the judgment as its foundation, and is at variance with all the recent decisions under the 4th section, in which it is laid down that this section only applies where an action is being brought on the verbal agreement. It is submitted, therefore, that this decision must be regarded as not law. In cases, however, under the 17th section the plaintiff would be entitled to say, 'The new contract which you set up is merely verbal and unperformed,

and should not be allowed to be good for the purpose of discharging the contract in writing on which I rely.' It seems to me that it is on this construction, if at all, that the decision in *Noble* v. *Ward* can be supported, because if the conclusion arrived at in this paper be not correct, and if there was no distinction between the sections, why should not the defendant have set up the parol agreement, since he was not trying to enforce anything by action? It seems evident also that since the passing of the Sale of Goods Act, section 4, the decision in *Noble* v. *Ward* is not law.

The class of cases above referred to has been recently discussed by Mr. Ernest C. C. Firth in the LAW QUARTERLY REVIEW, vol. ix, p. 366. Mr. Firth draws no distinction between cases under the 4th and 17th sections, and evidently thinks that on principle *Noble* v. *Ward* is right, and that several more recent cases *under the 4th section* (in which the defendant was allowed to succeed on a verbal agreement rescinding the former written agreement) are wrong. It will be gathered from what I have said, that if the view put forward in this paper be adopted, these cases were all rightly decided.

The distinction between the two sections that I have endeavoured to maintain is suggested, though perhaps faintly, in what was said by Lord Bramwell in *Noble* v. *Ward*, L. R. 1 Ex. 122, namely that 'the expression "allowed to be good" is not a very happy one, but whatever its meaning may be, it includes this, that it shall not be *held valid* or enforced,' whereas the expressions, 'no action shall be brought,' and 'no contract shall be enforceable by action,' include this only that the contract shall not be enforced by 'the *active* prosecution of claims in the Law Courts which are not supported by written evidence at the trial,' per Bowen L.J., *Miles* v. *New Zealand Alford Estate Company*, 32 Ch. D. 296.

Other cases may be suggested on which the distinction might have been of importance, for example, cases where the plaintiff sues for trespass to goods, and the defendant relies on an unperformed verbal agreement to sell, cases of seizure under execution, and of bankruptcy. The fact of the unpaid seller having a lien has no doubt been the reason why cases of this sort have not more frequently come before the Courts, but in the case of a verbal sale at a gross undervalue where actual *mala fides* could not be proved the question might have been raised. I say *might have been* because since the passing of the Sale of Goods Act it could not successfully be raised.

I may state that in writing the above I have not overlooked Lord Tenterden's Act, 9 Geo. IV. c. 14, 87, now embodied in section 4 of

the Sale of Goods Act, but it seemed to me that that section, whether declaratory, as it professed to be, or not, did not materially affect my conclusions.

For the purposes of this paper I have disregarded any distinction between a party to the contract and his representatives such as executors, trustees in bankruptcy, &c., and I should also add that even a defendant might be said to be enforcing a contract where he relies on the contract as an equitable defence to a legal claim instead of as in former days applying for an injunction.

I do not of course pretend to have given an exhaustive category of the cases or classes of cases which if my opinion be correct will be affected by the passing of section 4 of the Sale of Goods Act, but I have perhaps shown enough to render it possible if not probable that some change in the law has taken place, and that all contingencies were not present to the minds of those who asserted that there was absolutely no distinction between the 4th and 17th sections of the Statute of Frauds, and that the words 'shall not be allowed to be good' in the 17th section meant 'shall not be enforceable by action.'

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THE DOCTRINE OF *LUMLEY* v. *WAGNER*.

IN the month of November, 1851, Mlle. Joanna Wagner entered into an agreement in writing with Mr. Lumley that she should sing at Her Majesty's Theatre in London during the three months after April 1, 1852. A few days later, at the instance of Mr. Lumley, a clause was added to the agreement. By this additional clause Mlle. Wagner engaged not to use her talents at any other theatre nor in any concert or reunion, public or private, without the written permission of Mr. Lumley. Subsequently on April 5, 1852, Mlle. Wagner entered into an agreement with Mr. Gye to abandon the contract with Mr. Lumley and to sing at the Royal Italian Opera instead of at Her Majesty's Theatre. This somewhat high-handed action on the part of Mlle. Wagner gave rise to two leading cases. Mr. Lumley brought an action in the Queen's Bench against Mr. Gye for damages, and filed a bill in Chancery for an injunction against Mlle. Wagner. In both cases the plaintiff was successful, and both cases have been the subject of considerable controversy.

It is proposed to discuss here the doctrine applied by Lord St. Leonards in *Lumley* v. *Wagner*[1]. It is a well-known rule that the court will not order the specific performance of certain kinds of contracts, and amongst others of contracts of personal service. Mr. Lumley could not obtain an order compelling Mlle. Wagner to perform her contract to sing at Her Majesty's Theatre. He attempted to attain the same result by asking for an injunction to prevent her from singing elsewhere, and succeeded in his attempt.

This decision of Lord St. Leonards has been the precedent for numerous other attempts to obtain indirectly that which cannot be obtained directly, the specific performance of a contract for personal service. Some of these attempts have succeeded, some have failed, and up to the present time no sure and certain rule has been evolved; but it will be seen that modern judges are more unwilling than their predecessors to grant an injunction in this class of cases, and prefer to leave the injured party to a remedy in damages.

Lumley v. *Wagner*[1] was not the earliest case of its kind. In *Martin* v. *Nutkin*[2] certain churchwardens who represented the parish had agreed with the plaintiffs to suspend the ringing of a bell

[1] 1852, 1 D. M. & G. 604.

[2] 1724, 2 P. Wms. 266.

at five o'clock on the morning of each day in consideration of money paid by the plaintiffs for the erection of a clock and cupola. Lord Macclesfield in the first instance, and subsequently the Lords Commissioners, granted an injunction to restrain the ringing of the bell during the lives of the plaintiffs. That was a case where the Court of Chancery granted an injunction to restrain a party from doing an act where it would never have interfered by way of directing a specific performance. In *Barrett* v. *Blagrave*[1] a lease had been granted by the proprietors of Vauxhall Gardens containing a negative stipulation that the tenant of the house was to do no act to damage the custom or business of Vauxhall. After some time the proprietors of Vauxhall Gardens filed a bill for an injunction to restrain the tenant from breaking that stipulation. Lord Rosslyn said that it was a case of specific performance, but granted the injunction. Other similar cases preceded *Lumley* v. *Wagner*[2]. Lord St. Leonards said, 'I mean to execute the authorities: I bow to the authorities; I am giving no authoritative decision from myself; I mean to follow the authority of my predecessors.' It is immaterial now whether Lord St. Leonards in *Lumley* v. *Wagner*[2] did or did not go beyond the earlier decisions: the latter have merged in his judgment in that case. Probably he was influenced by some such considerations as the following. In this case the defendant has deliberately broken her engagement and has done such serious injury to the plaintiff that compensation in damages is almost impossible. I cannot compel the defendant to perform her contract. But she has also agreed not to sing at any theatre other than the plaintiff's. I can punish the defendant by restraining her from breaking the negative clause in her agreement. The Lord Chancellor himself says clearly that he would not have interfered if there had been no negative clause.

For some few years the decision in *Lumley* v. *Wagner*[2] was followed without question. In *Webster* v. *Dillon*[3] there was no argument for the defendant. In *Montague* v. *Flockton*[4], Malins V.-C. granted an injunction to restrain the breach of a theatrical engagement, though there was no negative clause.

In *Wolverhampton and Walsall R. Co.* v. *L. & N. W. R. Co.*[5], Lord Selborne argued that the technical distinction between the presence or absence of a negative clause was not important. 'I can only say that I should think it was the safer and better rule if it should eventually be adopted by this court to look at the substance and not at the form. If the substance of the agreement is such that it

[1] 1800, 5 Ves. 555.
[2] 3 Jur. N. S. 432.
[3] 1852, 1 D. M. & G. 604.
[4] 1873, L.R. 16 Eq. 189.
[5] 1873, L.R. 16 Eq. 433.

will be violated by doing the thing sought to be prevented, then the question will arise whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression.' Lord Selborne was speaking before the Judicature Act, and he puts the question in its true form: If a contract of personal service is broken by the servant, will the court grant an injunction to restrain the servant from entering the service of another, and thus indirectly compel the servant to perform his original agreement?

In *Donnell* v. *Bennett*[1] a contract for the sale of chattels by the defendant to the plaintiff contained an express negative stipulation not to sell to any one else during the period of two years. Fry J. intimated that in his opinion if the contract as a whole is the subject of equitable jurisdiction an injunction may be granted, but if the breach of the contract is properly satisfied by damages the Court of Equity ought not to interfere, and that the presence or absence of a negative stipulation was immaterial. 'That appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases.' The learned judge then said that there was direct authority that in cases of this kind the court has enforced a negative clause by injunction without regard to the question whether specific performance could be granted of the entire contract, and he granted an injunction until the hearing of the cause to restrain the defendant from selling the subject-matter of the contract to any person other than the plaintiff.

In *Whitwood Chemical Company* v. *Hardman*[2] the question was elaborately discussed in the Court of Appeal. In that case the defendant had agreed to become manager of the plaintiffs' business for a term of years, and to give the whole of his time to his duties under the agreement. During the term of his service the defendant wished to resign his position with the plaintiffs and join another company, and the defendant engaged actively in forming the new company. The plaintiffs claimed an injunction to restrain the defendant from doing anything which would prevent him from devoting the whole of his time to the plaintiffs' business. Kekewich J. granted an injunction restraining the defendant from giving less than the whole of his time to the plaintiffs' business. The Court of Appeal dissolved the injunction. Lindley L.J. said: 'Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will

[1] 1883, 22 Ch. D. 835.

[2] '91, 2 Ch. 419.

not be anywhere else at the same time and so on *ad infinitum*; but it does not at all follow that because a person has agreed to do a particular thing he is to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will.' Later on the Lord Justice added, 'I think that the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone: and whether it is attempted to enforce these contracts directly by a decree of specific performance or indirectly by an injunction appears to me to be immaterial.'

The Court of Appeal had no power to overrule *Lumley* v. *Wagner*[1], but the result of their decision is that *Lumley* v. *Wagner*[1] is an anomalous case to be followed in cases precisely similar to it, but an anomaly which it would be very dangerous to extend. The Lord Justices adopted in effect the dividing line suggested by Sir E. Fry in *Donnell* v. *Bennett*[2].

Since the decision of *Whitwood Chemical Company* v. *Hardman*, there are two reported decisions which ought to be mentioned, because they show that the decision in that case has not settled the question here discussed.

In *Grimston* v. *Cunningham*[3], the plaintiff was an actor and manager of a theatrical company, and the defendant was an actor. The defendant had agreed to be a member of the plaintiff's company during a specified tour, and one of the terms of the agreement was as follows: 'No member of the company is allowed to act, sing, or appear publicly at any other theatre or place of entertainment without special permission of the management.' During the tour the plaintiff and defendant disagreed, and the defendant without the permission of the plaintiff entered into an engagement to appear and actually appeared at another theatre.

The plaintiff issued a writ in the Queen's Bench Division claiming an injunction and damages. Bruce J. at Chambers granted an interlocutory injunction restraining the defendant from 'acting, singing, appearing, and performing publicly at any theatre or place of entertainment other than those at which the plaintiff and his company play, without the permission of the plaintiff during a period of twenty weeks (being the remainder of the tour specified in the agreement between the plaintiff and the defendant) or until the trial of the action.' The Divisional Court upheld this order for an injunction. Wills J. said: 'This is an agreement of a kind which is preeminently subject to the interference of the court by injunction, for in cases of this nature it very often happens that the

[1] 1852, 1 D. M. & G. 604. [2] 1883, 22 Ch. D. 835. [3] '94. 1 Q. B. 125.

injury suffered in consequence of the breach of the agreement would be out of all proportion to any pecuniary damages which could be proved or assessed before a jury. This circumstance affords a strong reason in favour of exercising the discretion of the court by granting an injunction.' It is at least doubtful whether the Lord Justices who decided *Whitwood Chemical Company* v. *Hardman*[1] would have accepted this reasoning. It is no doubt true that the injury resulting from a breach of a contract of personal service is in most cases out of all proportion to the actual legal damages which a judge would direct a jury to give; and it is true that it is most difficult to assess the damages which can be awarded in this class of case. But such reasons are not in themselves sufficient foundation for interference by an injunction, which allows to the defendant no other course than either to perform his agreement or to be idle. In *Whitwood Chemical Company* v. *Hardman*[1], Lindley L.J. said: 'What injunction can be granted in this particular case which will not be in substance and effect a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which when examined does not amount to this, that the man must either be idle or specifically perform the agreement into which he has entered.' In *Grimston* v. *Cunningham*[2] the defendant was an actor by profession, and the effect of the injunction granted in the case was that the defendant had to choose between idleness and performing his agreement with the plaintiff. In the same case Wright J. said: 'The contract contains a negative stipulation which the plaintiff seeks to enforce by injunction. Until the decision in *Donnell* v. *Bennett*[3] the doctrine in accordance with which such stipulations are enforced was seriously interfered with by the supposed rule that where there could be no decree for specific performance of a contract on the one side, there ought to be no injunction on the other side; but since the decision in *Donnell* v. *Bennett*[3] this view has been somewhat altered.' With deference to the learned judge, an examination of the authorities shows that the doctrine here discussed has had a different history. It is only in these latter days that the courts are coming to the conclusion that an injunction ought not to be granted except in cases where under the old practice it would have been right to file a bill in Chancery for equitable relief, and that in other cases the injured party must be left to his remedy in damages however inadequate that remedy may be.

In *Davies* v. *Freeman*[4], Kekewich J. held that the principle of

[1] '91, 2 Ch. 416.
[2] 1883, 22 Ch. D. 835.
[3] '94, 1 Q. B. 125.
[4] '94, 2 Ch. 654.

Lumley v. *Wagner* [1] ought not to be applied to an agreement which though negative in form is affirmative in substance. In that case the defendant had agreed to employ the plaintiff to manage the business of a carrier. The agreement contained the following clause: 'The employer hereby agrees with the manager that he will not, except in case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business certain specified sums of money.' The business was carried on under the agreement for two years. The defendant then gave the plaintiff a notice purporting to determine the agreement and the service thereby created. The plaintiff asked for an injunction to restrain the defendant from acting upon the notice and excluding the plaintiff from the management of the business. The application was refused. The learned judge treated the clause in the agreement which has been stated as equivalent to a stipulation by the employer that he will retain the manager in his employ, and proceeded: 'If the court come to the conclusion that that is really the substance of the agreement (which being an agreement for service cannot be specifically enforced), is it right, having regard to the lines the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of *Lumley* v. *Wagner* [1], which is not to be extended, to a case of this kind.'

The matter may be put shortly in this way. The appropriate remedy for a breach of contract is damages. In many cases money damages are not an adequate compensation to the injured party. In some of such cases the Court of Chancery, in order to avoid a denial of justice to the plaintiff, ordered the defendant to perform his contract specifically. The origin and early history of this exercise of equitable jurisdiction are lost in obscurity. But in early times it was established that the court would only order the specific performance of contracts in certain cases, and that in all other cases the only remedy was damages. And in particular the court has always declined to order the specific performance of contracts of personal service. But it is obvious that in this class of cases damages are a most inadequate remedy. Therefore some of the judges, influenced by a feeling that persons ought either to perform their contracts or be punished if they break them, and having no jurisdiction to make the parties perform their contracts specifically, and being unable to award adequate damages in respect of the breach of the contract, have, by the indirect method of granting an injunc-

[1] 1852, 1 D. M. & G. 604.

tion to restrain the breach of the contract, either compelled the defendant to perform his contract or punished him for his wrongful act in breaking the contract. At first the jurisdiction to award an injunction in cases of breach of a contract of personal service was justified by the presence of a negative clause in the agreement. In the leading case Lord St. Leonards says expressly that he would not have interfered if the defendant had not agreed that she would 'not' sing elsewhere than at the plaintiff's theatre. But later decisions have eaten away this foundation of the jurisdiction. It has been pointed out that an affirmative contract contains an implied negative contract. If *A* agrees with *B* to act at *B*'s theatre during the whole of a certain period, *A* has contracted by implication that during the specified period he will not act at any other theatre. To found the jurisdiction upon the presence of the word 'not' in the agreement is to regard the form rather than the substance of the contract. The presence or absence of a negative clause is now immaterial.

If that is so, *Lumley* v. *Wagner* [1] was decided wrongly, for the Lord Chancellor said that he would not have interfered if there had been no negative clause. Sir E. Fry, after an elaborate review of all the cases, states his conclusion thus: 'It is probable that the court will hereafter, except in so far as it may be bound by existing authorities, consider whether the contract in respect of which the injunction is sought is or is not of a kind fit for specific performance: that if it be, the court will tend to restrain acts inconsistent with it whether there be negative words or not; that if it be not of a kind fit for specific performance, no injunction will be granted even though negative words may be present [2].' It is obvious that the suggestion contained in this passage would, if adopted by the courts, be of great assistance to the practitioner, as it affords a clearly marked division between the cases in which an injunction would be granted and the cases in which an injunction would not be granted.

ERNEST C. C. FIRTH.

[1] 1852, 1 D. M. & G. 604.
[2] Fry on Specific Performance, second ed. (1892), p. 396.

ON THE CONSIDERATION OF THE PATENT GRANT, PAST AND PRESENT.

DOWN to comparatively modern times it has been the practice of the Crown to grant monopoly patents for new industries and inventions, without further disclosure of the particular means proposed for carrying these into effect than that vouchsafed by the petitioner in his application for the patent. The anomaly of the later practice of requiring the filing of a specification *after* the issue of the letters patent suggests that this proviso was in the nature of an after-thought, and formed no part of the original compact between the Crown and patentee. And this view is corroborated by the language of the earlier grants, the final clause[1] of which ran that these instruments should be favourably construed at law, 'notwithstanding the not full and certain describing the nature and quality of the said invention, or of the materials thereunto conducing and belonging.' The object of the insertion of this waiver clause in letters patent for inventions was to secure for these instruments the most favourable consideration in the Courts of Law. The latter were thereby directed to observe the plain intention of the Royal Warrant and to disregard any technical flaws which might have crept into the recitals of these grants, due to unintentional misrepresentation on the part of the applicants. Obviously, at this period of the history of patent law, neither specification nor any other form of written disclosure was required by the Crown in support of its letters patent. No great inconvenience appears to have arisen from the practice of the time, nor was any change in this respect advocated by the Common Law party in 1601, or again in 1623. What, then, was the essential consideration which secured for these grants a special exemption in the Statute of Monopolies? The answer is supplied by *Darcy* v. *Allin* and the Clothworkers of Ipswich case: 'the reason wherefore such a privilege is good in law is because the inventor bringeth to and for the Commonwealth a new industry,' &c. The bringing in of new trades or manufactures, therefore, being the whole aim and

[1] The history of the clause is as follows: Originally borrowed from a long series of Acts confirming grants of land, &c., to and from the Crown, it first appears in letters patent for invention in the grant to Acontius in 1565. It reappears about 1617, and thereafter was retained in these grants, with slight modification, down to the year 1883.

object of the monopoly system, we should expect to find in the legal text-books a clear indication of the once-existing obligations of the patentee in this respect, and of the modifications effected therein by the subsequent development of the doctrine of the patent specification. Yet, it is laid down by Hindmarch in his chapter on the Specification, that a grant was bad at law which contained no technical description in the recital, or in respect of which no specification was required to be filed; and elsewhere the same writer doubts whether the patentee was ever under an obligation to work his grant at all. And, although it is suggested by Webster, on the strength of a private Act passed under the Commonwealth, that the instruction of the public may have been secured by means of the Apprenticeship clause during the period preceding the practice of the patent specification, yet nowhere does this suggestion lead to an acceptance of the truth that the undertaking to work the grant constituted the essential consideration of the early Monopoly system. This proposition we now propose to demonstrate by adducing certain facts obtained from an examination of some early patent grants the text of which still awaits publication.

1. Clauses securing the introduction of the industry within a fixed period appear in grants made in respect of the following industries: No. II[1], saltpetre, one year; No. III, dredging, three months; No. VI, furnaces, two months; No. VII, mine drainage, three years; No. XIX, window glass, three months; No. XXIV, land drainage, three years; No. XXXV, water-supply, three years. The list is doubtless imperfect, but is sufficient to disprove the assertion that the 'working clause' is unknown to English Jurisprudence.

2. Where the obligation to introduce the industry is not explicitly expressed it may, nevertheless, be inferred from the existence of equivalent clauses such as the Apprenticeship or Efficiency clauses.

The Apprenticeship clause, which relates to the employment and efficient education of the native artisan, appears in grants numbered XIII, XVIII, XIX, XXXII; and in the Official Series No. 71 (A. D. 1634); 249 (1686); 261 (1688); and 356 (1698). It applied only to foreigners, and was intended to secure the continuity of the industry in case of the withdrawal of the patentees at, or before, the expiration of the term of their monopolies. Clauses providing for the inspection of the manufacture or fixing a minimum output are also occasionally to be found in the patent rolls of Elizabeth.

[1] To avoid possible confusion it should be stated that the Roman numerals relate to grants made under Elizabeth, copies of which are in the writer's possession. An analysis of these grants, Nos. I–XXII, appeared in the L. Q. R. Apr., 1896. Those quoted with an Arabic numeral refer to the official series which commences A. D. 1617.

3. But the truth of our proposition is, perhaps, most clearly to be seen from an analysis of the petitioners' statements and professions which form the groundwork of the recitals of these grants. The statements herein most commonly relied upon consist of declarations to the following effect:—that the petitioner had by the expenditure of time and money become possessed of the secrets of an industry the introduction of which would prove beneficial to the Realm[1]; that certain steps towards its introduction had already been effected; that the industry had not hitherto been practised, &c., &c. In such cases the applicant was bound by his own undertaking and forecast, not only to introduce the industry, but to realize to the full the expectation which the Crown had been led to form concerning it. In other words, the industry, when introduced, must prove both beneficial and sufficient before the patentee could be held to have discharged his liabilities.

We have now to account for the rise of the doctrine of the patent specification in the eighteenth century. When, and under what circumstances, did the Crown commute the obligation to work the industry by the substitution of a proviso requiring a formal disclosure of the inventor's secrets? The absence of statutory authority for the change has frequently been commented upon. The difficulty, however, disappears upon an examination of the original documents in connexion with grants containing the first recorded instances of this requirement.

For our purpose it will be sufficient to take (1) Sturtevant's patent and treatise of Metallica, dated 1611–12 (*Patent Office. Supplement to Letters Patent* No. 1); (2) Nasmyth's patent and Specification dated 1711–12. These grants, which at an interval of a century mark respectively the introduction and revival of the proviso of the specification, prove conclusively (1) that the latter was introduced by the patentee for his own security, (2) that the acceptance of the applicant's offer by the Crown left intact the original undertaking on the part of the patentee.

The facts relating to the grant of Sturtevant are as follows:—Simon Sturtevant, a manufacturer of tiles, pipes, and other pressed ware at Highgate, applied in 1611 for the exclusive right to the use of certain inventions in connexion with the application of coal for smelting iron, and generally for the application of coal as fuel in industries in which wood was then solely employed. With his application the inventor appears to have filed in manuscript what he terms

[1] Notice the corresponding change of language in the statutory form of patent application. Prior to 1852 no stereotyped form was in use. In this year the petition ran: 'That your petitioner is in possession of an invention which he believes will be of great public utility,' i.e. the introduction of which will be, &c. In 1884 this suggestion disappears entirely.

a 'treatise of Metallica'; and this treatise he further covenanted to supplement by a final and more explicit statement to be printed and published within a fixed period after the letters patent. This anticipation of the modern system of provisional and complete specification is in itself sufficiently curious. But Sturtevant not only anticipates the practice but, to some extent, the entire modern doctrine of the specification. At the end of his final 'treatise of Metallica' the author gives his reasons for the unusual course he had elected to adopt. They were (1) that it might appear that his inventions were new, and of his own devising, and not stolen from any other; (2) that the endeavours and inventions of other men, being different from his own, might not be prevented by him; (3) that none other should hereafter presume to petition His Majesty for inventions identical with those described by him; (4) that he was bound by the proviso (which he had caused to be inserted) in his grant, whereas he was not tied to any time for the trial of his inventions. But in respect of this last assertion Sturtevant's doctrine proved to be in advance of his times, for his patent was cancelled in the following year on the ground of his outlawry and *neglect to work the patent*. The patent was reissued, subject to similar conditions, to one Rovenzon, who published a third treatise on the subject. But the fact upon which we wish to insist here is that the modification of the procedure was due to the suggestion of the patentee and not of the Crown.

In the case of Nasmyth's patent the same fact has to be recorded. The petition and report of Sir Edward Northey—the Attorney-General—are still preserved at the Record Office (*State Papers Dom. Anne.* Bundle 19. No. 161), but, as the latter is a purely formal document, we prefer to quote from the original unpublished grant upon the patent rolls, which clearly recites the circumstances under which this proviso was again introduced.

PATENT ROLL, 10 ANNE. PART 2.

'Anne, &c., Whereas John Nasmith of Hamelton in North Britain, apothecary, has by his petition represented to us that he has at great expense found out a new Invention for preparing and fermenting wash from sugar "Molosses" and all sorts of grain to be distilled which will greatly increase our revenues when put in practice *which he alleges he is ready to do* "but that he thinks it not safe to mencon in what the New Invention consists untill he shall have obtained our Letters Patents for the same. But *has proposed* to ascertain the same in writeing under his hand and seale to be Inrolled in our high Court of Chancery within a reasonable time after the passing of these our Letters Patents," &c.'

From these cases we may deduce the origin of the specification, viz. that the practice arose at the suggestion, and for the benefit, of the grantee with the view of making the grant more certain, and not primarily as constituting the full disclosure of the invention now required at law for the instruction of the public.

This theory harmonizes with what is known of the practice of the sixteenth and seventeenth centuries. So long as the monopoly system aimed at the introduction of new industries such as copper, lead, gold, and silver mining, or the manufacture of glass, paper, alum, &c., &c., the requisition of a full description would have required a treatise rather than a specification, and would have materially detracted from the concession offered by the Crown, besides constituting a precedent for which no sufficient reason or authority could have been adduced. But when, by a natural development, the system began to be utilized by inventors working more or less on the same lines for the same objects, the latter for their own protection draughted their applications with a view of distinguishing their processes from those of their immediate predecessors, and of ensuring priority against all subsequent applicants. Hence, while the recitals of the sixteenth century deal almost exclusively with suggestions of the advantages which would accrue to the State from the possession of certain industries, or with statements respecting steps taken by the applicants to qualify themselves for the monopoly, those of a later date not infrequently deal with the technical nature of the proposed improvement. These recitals, therefore, while forming no part of the consideration of the grant, are undoubtedly the precursors of the modern patent specification. Between 1711 and 1730 the wording of the proviso (when the latter appears among the general covenants of the grant) distinctly recognizes the proposal as emanating from the applicant —'whereas *A* did propose to ascertain under his hand and seal, &c., &c.;' but about the year 1730 the form of a proviso voiding the grant in case of the non-filing of a specification was substituted. Still the practice of requiring a specification cannot be said to have been recognized as essential to the validity of a grant prior to the middle of the eighteenth century.

In 1770, Lord Mansfield, in *Liardet* v. *Johnson*—a trial which may be regarded as a landmark in the history of English patent law—invested the patent specification with a character and function totally distinct from that with which it had been originally introduced. For the facts of this case we have mainly to rely upon the memory of Bramah, who was present at the trial, and who subsequently incorporated his account in a letter published some years later. From this source we gather that the doctrine of the

instruction of the public by means of the personal efforts and supervision of the grantee was definitely and finally laid aside in favour of the novel theory that this function belongs to the patent specification—an instrument introduced by the irony of fate to make the grant more certain! At the same time the novelty of the invention was subjected to a new and more searching test.

Hitherto the novelty of no grant appears to have been successfully challenged except upon the ground of prior user within the Realm, but in this trial the practice of what is known as the 'mosaic of anticipation,' was admitted in impeachment of the Inventor's privilege[1]. So complete a *volte-face* could hardly have been effected if the history of the law had preserved some sort of continuity. This however does not appear to have been the case.

For a period of over a century the reported cases are destitute of any decision of importance in this branch of jurisprudence. *Edgeberry* v. *Stephens* attests a tendency to rely upon a verbal criticism of the Statute of Monopolies rather than upon the earlier practice, of which that statute is professedly an exponent. At the end of the eighteenth century, therefore, the Common Law Judges were left to pick up the threads of the principles of law without the aid of recent and reliable precedents.

The rapid and unprecedented development of the patent system, stimulated by the mechanical inventions of Arkwright, Watt, and others, excited at once the admiration and jealousy of the manufacturing classes. The constitutional nature of these grants was again called in question, and an attitude of rigorous rather than benevolent interpretation was commonly assumed in the Court of Common Law. Hence under the new industrial conditions, and with the changed interpretation of the Statute of Monopolies, it is not surprising that a pronounced divergence should have taken place between the two systems; the leading characteristics of which may be thus tabulated:—

Sixteenth Century.	*End of Eighteenth Century.*
Consideration of the grant the introduction of the industry. Formal disclosure of the invention waived by the Crown.	Consideration of the grant the written disclosure of the invention. No proof of working required.
Patents of addition of doubtful validity.	Patents of addition good at law.
Crucial test of monopoly prior user within the realm within the memory of man.	Crucial test of grant absolute novelty of the invention both in practice and as regards the published literature of the Art within the Realm.
Prior sale not prejudicial.	Prior sale fatal to the validity of patent.

E. Wyndham Hulme.

[1] A list of the anticipations relied upon will be found in an anonymous pamphlet entitled 'An Appeal to the Public on the right of using oil-cement, 1778.'

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Key and Elphinstone's Precedents in Conveyancing. Fifth Edition. By Sir H. W. Elphinstone. London: Sweet & Maxwell, Lim. 1897. La. 8vo. Two vols., vol. 1, lxxx and 974 pp., vol. 2, lxxiv and 988 pp. (3*l.* 10*s.*)

Key and Elphinstone's Precedents in Conveyancing have borne the highest reputation from their first appearance in 1878. The second edition, published in 1883, afforded most valuable help to those who had any part in the extremely difficult task of adapting the existing conveyancing practice to the changes introduced by the Conveyancing and Settled Land Acts. To this the writer can personally testify, having used the book constantly for many years. A third edition was called for; and in 1894 a fourth edition appeared under the editorship of Mr. Key alone, though with the assistance of Mr. C. Herbert Brown. This edition was distinguished by thorough revision of the forms, and by large additions to the learned and instructive notes, which had from the first enriched the book. Its success was complete. Within a short time the publication of a fifth edition was rendered necessary; and the task of preparing it was undertaken, after Mr. Key's lamented death, by Sir H. W. Elphinstone, with Mr. W. H. Coltman's aid.

The present edition is in every way worthy of its predecessors. We note the appearance for the first time of a table of abbreviations, a most useful addition to a book of precedents printed in the abbreviated forms generally employed in drafting. The notes have been carefully revised in the light of the decisions reported and statutes passed since the last edition was published. We are glad to have the editor's opinion (vol. i. p. 75, n. (*d.*) and Addenda) that where a life interest in any property is surrendered or otherwise extinguished in the lifetime of the tenant for life, estate duty will not be payable on his death, except, perhaps, if he die within a year after (see additional Addenda). The editors of the new Hanson's Death Duties have come to the same conclusion. On this point the writer's experience may be interesting. In the autumn of 1895 he had advised against the liability to estate duty in such a case; and on his opinion being submitted to the Comptroller, the claim of duty was withdrawn. About the middle of 1896, the same point arose in a case in which the writer was a trustee. On this occasion he was informed that subsequently to the Comptroller's acquiescence in his opinion the law officers had advised that estate duty was payable in such cases; and estate duty was claimed. Early this year the writer was again interested in the question as trustee; this time no estate duty was claimed, on the ground that in that particular case the surrender was made before the commencement of the Finance Act. Amongst other additional notes is a useful one on searches (i. 429) and another on charitable conveyances (i. 565). Some new precedents of conveyances to charities are also supplied. The forms of mortgages of land with chattels annexed and of

equitable mortgages have been redrawn, and the forms in matters of lunacy have been adapted to the present practice.

We regret that so accomplished a conveyancer as the late Mr. Key gave countenance (i. 70) to the notion revived by Lord Justice Kay in *Re Frost*, 43 Ch. D. 246, 253, that there is an old rule of substantive law against a double possibility. As Mr. Charles Butler pointed out long ago (Fearne C. R. 251, n., 9th ed.), if there were such a rule it would make void a remainder to the first son of *A* (a living person), who shall attain twenty-one; which is unquestionably valid. Mr. Key (i. 225, 349 (*a*)) called *Bolton* v. *London School Board*, 7 Ch. D. 766, a *strong* decision. This seems to us to be too mild an epithet. May not that decision be summed up in the proposition that a vendor's obligation to show forty years' title (that is forty years' seisin in fee) is discharged by showing that his predecessors were so seised *twenty-five* years ago? And is not this proposition clearly wrong?

We note that Mr. Key did not fall into the pit revealed by *Re Harkness and Allsopps' Contract*, 1896, 2 Ch. 358, as to the incapacity of a married woman trustee. This recalls to our mind the justly admired carefulness which enabled the authors of the second edition to escape another legislative snare—the temptation to incorporate the statutory covenants for title in a bill of sale. We are, therefore, somewhat surprised at the confidence with which Mr. Key maintained (i. 461) that there can be no doubt that a conveyance by a tenant for life under the Settled Land Act overrides a mortgage by the remainderman; and the reasoning by which this contention is supported does not impress us by its strength. It is only fair to state, however, that the writer may be prejudiced; as he has a shrewd suspicion that he himself is the wicked doubter intended to be pilloried in Mr. Key's text. Still, it has been considered by North J., in *Re Sebright's Settled Estates*, 33 Ch. D. 429, 438, and Chitty J., in *Cardigan* v. *Curzon Howe*, 40 Ch. D. 338, 342, that the exception in sect. 20 (2, ii) of the Settled Land Act, 1882, of 'all such other estates as have been conveyed for securing money actually raised' applies to estates created by mortgage of their estates by any of the persons entitled under the settlement: though Chitty J. indeed suggested that it was open to reconsideration whether these words of the Act were anything more than an exception out of the words 'estates, interests and charges subsisting or to arise *under the settlement*,' from which estates, &c., the land is discharged by the life-tenant's conveyance. But the great obstacle to adopting this view is that the first exception (s. 20 (2, i)) of all estates, &c., having priority to the settlement cannot possibly be brought under the head of an exception to estates, &c., subsisting *under* the settlement. How then can such a qualification be placed on the very wide and general words of the second exception? We think that Mr. Key might at least have referred his readers to these opinions. In connexion with this point it may be noted that Mr. Wolstenholme boldly states (Conveyancing, &c., Acts, 321, 7th ed.) that the principle of *Wheelwright* v. *Walker*, 23 Ch. D. 752, which decided that an absolute conveyance by the remainderman may be overridden by an exercise of the power given by the Settled Land Act, applies to a mortgage by the remainderman: but the difficulty in the way of accepting this view is that a difference between a sale and a mortgage by the remainderman seems to be created by the very words and apparent policy of the statute. Mr. Key also overlooked this fact in stating that the suggestion of a difference in the position of a purchaser and that of a mortgagee from the remainderman involved an absurdity. Mr. Wolstenholme, like Mr. Key, does not notice the judicial opinions we have quoted; and Messrs. Hood and Challis (p. 219, 4th ed.) are equally silent concerning

them. It seems to us that in this matter conveyancers generally have acted with a blind trust very different from that abundant caution which 'is the badge of all our tribe.'

There is one defect which we think grave. A book of so high a standard as the present ought, we submit, to give at least one precedent of a private contract for the sale of land which is not settled entirely from the vendor's point of view. The late Mr. Key was, unfortunately, content to say (i. 316, n.) that 'the conditions usual on sales by auction are very commonly, notwithstanding the stringency of some of them, submitted to on sales by private contract'; and to give precedents of agreements for private sale, from which one would gather the impression that it was the established custom for the purchaser to pay a deposit to the vendor, and for the vendor to reserve a right of re-sale on breach of any of the stipulations of the agreement; see i. 318, 319, 321. Purchasers indeed submit too often to disadvantageous stipulations. But why? Is it not generally because of the supineness of their professional advisers? It is an abuse, as the author of the Mirror would say, that purchasers by private contract should be expected to accept stipulations devised entirely in the vendor's interest; and we look to the authors of a book of practice like the present volume to check and not to foster such abuses. It is significant that though we find precedents of several stipulations throwing vendor's costs on the purchaser, we have not found a single example of a provision that the vendor shall pay the expense of producing any title-deeds which are in the possession of mortgagees. Yet such a condition is approved by several provincial law societies as proper to be made even on sales by auction: and the truth is that it ought to be submitted, as a matter of course, by every conveyancer engaged in settling a contract for sale on the purchaser's behalf. Mr. Key's default is the more curious as he noticed (i. 226) that the construction placed on sect. 3 (6) of the Conveyancing Act altered 'what was previously the well-recognized practice.'

We venture to suggest, lastly, that Sir H. Elphinstone might with advantage revise his statement (ii. 425, n.) of his reasons for continuing to employ the words 'for her separate use' in limitations to a married woman. It seems to us too general to say that 'the effect of the decisions appears to be that every settlement or agreement for a settlement of the property of a married woman is to be construed and take effect exactly as if the Act had not been passed.' If this were so a limitation contained in a woman's marriage settlement of property to her for life (without further words) would give her husband such interest therein as he would take at common law: but *Re Lumley*, '96, 2 Ch. 690, shows that this is not the case. Again, we think that the note, ii. 674 (*b*), may be misleading. The editor then explains that it is the practice in bequeathing a legacy to a married woman to add the words 'for her separate use': although, he says, these words are not absolutely necessary. But it is exactly in the case of a gift to a married woman by will that such words may be absolutely necessary to carry out the testator's intention; as the legatee may, for example, have married before 1883 under such a settlement as must be construed, according to the decisions, as if the Married Women's Property Act had not passed.

We feel sure that the present edition will enjoy the same success as the last, and we look forward to the publication of yet another edition before very long. We hope that Sir Howard Elphinstone will again be able to undertake the revision of the work, for no pains will then be spared to make it perfect.

T. C. W.

The Criminal Law of India. By JOHN D. MAYNE. Madras: Higginbotham & Co. London: Wm. Clowes & Sons, Lim. 1896. 8vo. 973 pp. (36*s.*)

WHEN, some six-and-thirty years ago, Macaulay's code, after various revisions, became law in India, taking the place of the unintelligible chaos of criminal enactments previously in force, Mayne's Commentary on the Penal Code was one of the most useful guides to the new law offered to those concerned with its administration. The work now before us is intended (as the learned author tells us in his Preface) to supersede the commentary, from which it differs both in scope and arrangement. It consists of two parts. The first part contains the text of the Indian Penal Code with some notes to the sections, directly explanatory of the text and bearing more immediately upon its meaning. These notes are generally relevant to the subject-matter—Substantive Criminal Law.

In Part II the author has taken a wider field. In this part 'I have,' he says, 'attempted to offer a methodized view of the Criminal Law at present administered in India, so far as it is based on the Penal Code, the Criminal Procedure Code, and the Evidence Act. I have not touched upon Local and Special Acts. I have only dealt with Procedure so far as it affects the actual trial and matters incident to it.'

In excluding Local and Special Acts Mr. Mayne has exercised a wise discretion. There are so many Local Legislatures which deal with so many and so diverse matters of local interest merely—matters many of which in this country are dealt with by by-laws made by a board or other similar authority—that the inclusion of enactments not generally applicable would increase the size of the book without commensurate advantage, and obscure the more important matter by admixture with subjects of limited interest and secondary consequence.

From Mr. Mayne's exposition of his design it will appear that he has not confined his work to Substantive Criminal Law, but has included somewhat of Adjective Law connected with Evidence and Procedure. The last three chapters of the second part, entitled respectively 'Pleading,' 'Evidence,' and 'Proceedings incident to the Trial or following after it,' deal with topics of Adjective Law; and it may be said by way of criticism that these topics might well have been left for treatises upon the Indian Evidence Act and the Indian Code of Criminal Procedure. If Mr. Mayne's book were concerned with English law administered in England, the criticism might be just; but it has much less force applied to Indian law, regard being had to those who administer it in the districts and the circumstances under which it has to be administered. For those employed in its administration the additional 110 pages contained in these three chapters, and giving a skilfully summarized view of essential points of practice of ordinary occurrence, will have a practical utility which will counterbalance the violation of scientific classification.

The subject of Chapter II is 'Local Extent of Indian Jurisdiction,' and here the author has dealt with Extradition; Extraterritorial Jurisdiction in respect of offences committed (1) on land, (2) on sea; Personal Liability to Jurisdiction; Admiralty Jurisdiction; Piracy; and the law applicable in cases to which the Penal Code does not apply. A mere theoretical critic might here again exclude much of the valuable matter contained in this chapter, upon the ground of violating strict scientific classification; but many a magistrate and district judge will be grateful to find ready to his hand, when

occasion requires, the law upon questions not arising in the daily practice of his Court, with which he can scarcely be expected to be familiar, and which without this help he would have to ascertain with trouble for which he has little leisure, and without the assistance of a proper law library.

In explaining and illustrating portions of his subject Mr. Mayne has largely used the decisions of the Civil Courts. We may take as instances his treatment of the following topics:—Acts of State; Martial Law; the Immunity of Judges and other officers acting in the administration of justice, and in this connexion the Right of Arrest; Fraudulent Transfers and Suits; Nuisances; and Fraud as an Element of Cheating. In defence of this method he says in his Preface:—'It will be observed that I have made a more extensive use of the decisions of the Civil Courts than is usual in works on Criminal Law. This seems to me necessarily to follow from a perception of the fact that Criminal Law is itself only a branch of the general law of the country. With the exception of purely statutory offences nothing is crime which has not previously been a wrong, and in most cases, before the accused can be convicted of a crime, it is necessary to show that he has committed an act which would be treated as illegal by a Civil Court. In England, where knowledge is highly specialized, and where every practitioner has ready access to extensive libraries, it may be sufficient to cite decisions of the Criminal Courts. In India, where outside of the Presidency towns law-books are unattainable, both advocates and judges will, I think, be assisted by being supplied with information of a more wide and ample character.' An examination of the matter concerned with the topics mentioned above as instances of this mode of treatment will not dispose any one experienced in the administration of justice in India to dissent from the view here expressed.

When the Codes were first introduced, it was expected that their provisions would be so self-evident from the language in which they were embodied that resort to external means of interpretation would be unnecessary. Indeed, such resort was deprecated as likely to lead the mind away from the plain meaning of the text, and so into possible error. This expectation of the authors was natural, seeing that their minds were imbued with the subject; and that, being fully conversant with all its intricacies and ramifications, they believed they had expressed in language of no doubtful import the rules which enunciated the principles selected by them from the wide field of their own knowledge. But some of those who had to interpret the Codes came to the task with no other antecedent knowledge of the subject. Others had some such knowledge, but imperfect in varying degrees. Few, if any, were able to read the language of the new law in the perfect light enjoyed by those who had selected it. To all, the understanding of abstract propositions without the help of concrete instances was in greater or less measure difficult. To some it was impossible—impossible in the same way as it is impossible for the average schoolboy to comprehend a rule of arithmetic or algebra without a concrete example. The use of concrete instances in order to understand and interpret the abstract language of the Codes thus became a necessity. Indeed, the employment, though limited, of such instances as Illustrations in the Codes themselves favoured the practice. And when further instances were wanted where would they be more naturally sought for than in that English law which contained the sources of the Codes themselves? To put the matter another way, those who had to understand the Codes in order to administer them were perpetually trying to reach the standpoint of knowledge enjoyed by those who framed them. Thus it has come to pass that the decisions of the English Courts are daily

quoted, referred to, and relied upon, in the arguments of advocates and the decisions of judges throughout the Courts in India. Mr. Mayne has in his work used the same assistance to the elucidation and understanding of the Criminal Law. He says:—'It may, perhaps, be charged against me that I have adopted a line of discussion which has frequently been reprobated by the Judicial Committee—that of attempting to explain the Code by reference to English authorities. My chief answer must be that, in doing so, I am following the example of the Indian Courts, as will be seen in every volume of their reports. It is quite certain that whenever an appeal is preferred to the High Courts, if any question of law is not covered by Indian authority, it will be discussed with reference to English text-books and decisions. I have attempted to supply the local bar and bench with the authorities by which their proceedings will undoubtedly be tested upon appeal. In most cases, however, the objection is itself inapplicable. The Penal Code supplies a series of clear and definite rules, which are to be found in numbered sections, instead of having to be hunted for through a library of law-books. The application of the rules depends upon the facts of each case, which shade away by infinite degrees from absolute certainty to the slightest suspicion. In such cases the recorded experience of centuries of English experts must be of the highest importance.' From a practical point of view the truth of these remarks is incontrovertible. Advocates and judges will continue to refer to English text-books and English decisions, unless or until the practice be expressly prohibited by an Act of the Legislature. At the same time it must be borne in mind that in the numerous Courts which administer justice to the millions inhabiting the vast countries included in the geographical term 'India,' the manufacture of concrete instances is proceeding at a rapid pace; and the necessity for reference to English instances will yearly be diminishing. It is due to Mr. Mayne to say that he has used the Indian instances to date, and that his references to English cases is principally where the ground has not yet been occupied by Indian decisions.

Mr. Mayne's treatment of his subject is in general very complete—so much so, that in dealing with some questions he has not only exhausted the cases which have occurred in practice, but has passed on to consider possible cases which have not yet arisen. Judges are content to deal with the cases which have actually arisen and come before them; and Mr. Mayne might well have followed the same rule. It is not always easy to anticipate how far future cases will be modified by surrounding circumstances, or to foresee the effect of arguments upon the judicial mind. The author's ripe experience, however, excuses what in a younger writer would require a stronger apology; and regard being had to the qualifications of the great majority of those who will use the work, we are not disposed to quarrel with assistance which to many will be of great value. Mr. Mayne's observations are always judicious and acute, and, therefore, deserving of consideration. In one instance, where he considers the question of the patient's consent to a surgical operation, his view has received corroboration from a recent decision of the English Courts.

Mr. Mayne does not hesitate occasionally to criticize the decisions of the judges of the Indian High Courts. This is, however, done in language never wanting in the respect properly due to the Judiciary. Judges must be occasionally fallible or there would be little justification for the existence of Courts of Appeal. Where opinions differ, all cannot be right. In India there are four separate High Courts. A difference of opinion on moot points between the judges of the same Court is provided for by an excellent

practice of referring such point to a Full Bench, consisting usually of five or more judges, who, after consideration of the conflicting decisions and opinions, decide the question finally. Such decision becomes binding for the future upon all the judges of the Court, and, of course, upon all judges and magistrates subordinate thereto; but though considered with respect by the other High Courts and the judges and magistrates subordinate to them, it has no binding effect upon them; and it may happen—indeed it has in several instances happened—that the view taken by another High Court is different and conflicting. Unfortunately no procedure has been provided by which the different High Courts may arrive at mutual uniformity *inter se*. In this state of things, when two High Courts differ, and a district judge or magistrate, subordinate to a third, which has not decided the point, is at liberty to take either view and is in doubt which decision to follow, it is impossible to say that he will not derive assistance from the able argument of a learned text-writer. Where questions have been decided without, or with little, argument or consideration, and have not yet reached the more careful deliberation of a Full Bench, criticism is equally justifiable and useful.

In conclusion, taking the book as a whole, Mr. Mayne's Criminal Law of India is a most useful addition to the works upon this subject which have already made their appearance in that country, and it well maintains the reputation of the learned author.

The Law of and Practice in Lunacy. By A. Wood Renton. Edinburgh: William Green & Sons. London: Stevens & Haynes. 1896. La. 8vo. lxiii and 1151 pp. (50*s.*)

This is by far the most complete treatise on lunacy with which we are acquainted, and it will doubtless become the standard work on the subject. It is divided into three parts, of which Part II, entitled 'Lunacy dependent on Statute,' comprises more than three-fourths of the whole. Herein are set forth the Lunacy Acts 1890 and 1891, the Rules of the Commissioners, the Criminal Lunatics Acts 1800–1884, and other enactments. These are well arranged, and each section appears to be fully and carefully annotated. This method is generally admitted to be the most useful and acceptable to the practitioner, but it calls for little more than that diligence and care which characterize the whole of Mr. Wood Renton's work.

Part I deals with 'Lunacy independent of Statute,' or the common law of lunacy, and here the writer's legal acumen is put to a severe test. These chapters treat of insanity in relation respectively to contract, marriage, wills, torts, and life insurance. Each chapter contains a sketch of the historical development of the law followed by a discussion of the modern law and practice, and throughout the whole the author displays sound learning and discrimination of a high order.

The least satisfactory chapter is that on insanity and tort, but perhaps the author is hardly to be blamed in view of the scantiness of his material, consisting, as it does, only of a few *obiter dicta* and some rather obscure American cases. Mr. Wood Renton seems to incline to the view that insanity is a good defence in an action of tort if it be proved that the defendant is so insane as not to know the nature and consequences of his act. He may be right, but his reasons are not very clearly given. The dictum of Lord Esher—it is strictly an *obiter dictum*, not an 'express ruling'—in *Hanbury* v. *Hanbury* seems to imply that insanity is a good defence in a civil action of tort to the same extent as it is in a criminal proceeding, but

the actual statement is negative and is to the effect only that insanity cannot be a defence to a civil or criminal wrong, unless the disease of the defendant's mind is so great that he is unable to understand the nature and consequences of his act. So far there is no difference in principle between tort and contract. But there is the further question whether insanity can in any case be an answer in tort. There appears to be no authority in the English reports, and this of itself raises a presumption that the defence is not available. The presumption is fortified by a dictum of the Court in *Weaver* v. *Ward* (Hob. 134), that 'if a lunatic hurt a man, he shall be answerable in trespass.' And this is quoted as the law in Bacon's Abridgment. But may not the defence be available in those cases of tort in which the state of the defendant's mind is material, such as malicious prosecution and defamation where express malice has to be proved? On this point Mr. Wood Renton gives us no information. There is, however, a dictum of Kelly C.B., that 'a lunatic is liable to an action for libel' (*Mordaunt* v. *Mordaunt*, 39 L. J., P. & M. 59). But in America it seems to have been held that a lunatic is not liable in such cases (see Addison on Tort, seventh edition, p. 124), and in other cases the insanity of the defendant has been taken into account as affecting the measure of damages. So it is said that in slander where the derangement of the defendant's mind is great and notorious, so that the speaking of the words could produce no effect on the hearers, the slander is not actionable because no damage would be incurred (*Dickinson* v. *Barber*, 9 Mass. 225). In *Krom* v. *Schoomaker* (3 Barb. N. Y. 647) it is said that in false imprisonment a lunatic defendant should only be called on to pay actual compensation and not exemplary damages (see also *Jewell* v. *Colby*, 24 Atl. 902).

One may speculate as to whether a lunatic could set up his insanity as a defence in an action for negligence where the duty to take care arose out of a relationship entered into by the plaintiff with knowledge of the defendant's insanity. Would the proprietor of a house licensed for the reception of lunatics succeed in an action against one of his patients for negligently setting fire to the house? Clerk and Lindsell (*Torts*, second edition, p. 40) suggest that a lunatic's liability for negligence stands on the same footing as that of a young child, that is to say, it is a question for the jury whether he was sufficiently self-possessed to be able to take care. We should have welcomed a fuller discussion of these questions and references to all the authorities.

Throughout the work extensive use is made of American and Scottish cases, and we are glad to see adopted the useful practice, now rapidly becoming general, of giving the date of each case. But sufficient care is not taken to distinguish the year of the decision from that of the report. Thus *Ford* v. *Stier* is cited as '1896, Prob. 1.' It should be '1895, [1896] P. 1,' or if the date of the report only is shown, '[1896] P. 1.' In the old cases it would be better to give the calendar year rather than the regnal year. Such citations as '*Stroud* v. *Marshall*, 37 Eliz. Cro. Eliz. 398' and '*Cole* v. *Robbins*, 2 Ann. B. N. P. 168' are clumsy if not puzzling.

We wonder whence Mr. Wood Renton gets his new readings of the Statute 'De Praerogativa Regis.' We should have thought the text as printed in the Statutes of the Realm and Ruffhead's edition, 'Rex habet custodiam' quite as good as that suggested, 'Rex habebit custodiam,' which is not the Latin for 'The king shall have the custody.' Mr. Wood Renton has adopted the English version as printed in the Statutes of the Realm, but has made a good many emendations in the Latin text, none of which commend themselves to our judgment.

Tagore Law Lectures, 1893. *Estoppel by Representation and Res Judicata in British India.* In Two Parts. I. *Modern or Equitable Estoppel.* II. *Estoppel by Judgment.* By ARTHUR CASPERSZ. Second Edition. Calcutta: Thacker, Spink & Co. London: W. Thacker & Co. 1896. La. 8vo. xxxix and 444 pp.

WE noticed the first edition of this work at page 86 of vol. x of this REVIEW, and have not much to add. The present edition has been duly brought up to date, and our opinion as to the general merit and utility of the book is confirmed by further examination. When the law differs from that in England, which is rare, the difference is noted, as at p. 103, under 'Landlord and Tenant,' where it is shown that the rule in England that a lessee is estopped from questioning his lessor's title has been varied in India to admit of the lessee explaining his landlord's Benámi title; and at p. 170, under Bills of Exchange, the acceptor of a Bill of Exchange in India, being at liberty to deny that the bill was really drawn by the person by whom it purports to have been drawn. When in India cases are wanting, but the English rulings are embodied in Acts of the Indian legislature, as is noticed at p. 106, in reference to section 43 of the Transfer of Property Act, and p. 189 as to Act VI of 1882 (The Indian Companies Act), the Acts are considered with reference to the English cases and the same sorts of estoppel which might arise in India.

In chapter vi there is an interesting consideration, in connexion with the Indian decisions, of the effect of section 108 of the Indian Contract Act as compared with the corresponding provisions in previous English enactments (Factors' Acts of 1842 and 1877).

The author throughout the portion on Estoppel by Representation gives prominence to the view deducible from the important decision of the Privy Council in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*, L. R. 19 I. A. 203 (1892), and other recent English decisions, that the determining element in all cases of estoppel by representation is not the motive with which the representation was made, or the state of knowledge of the party making it, but the effect of the representation, as having caused another person to act on the faith of it.

Estoppel by *res judicata* is complicated in India by the questions arising as to the concurrent authority of the two Courts in which the two suits have been instituted. The Courts in India are, as to jurisdiction, differently constituted to those in England. The important rule referred to in page 285 as having been laid down by Sir Barnes Peacock in *Mussumut Edun* v. *Mussumut Bechun*, 8 W. R. 175 (1867), that 'in order to make the decision of one court final and conclusive in another court, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit,' which was approved of by the Privy Council in 1882 in *Misir Raghobardial* v. *Sheo Baksh Singh*, L. R. 9 I. A. 197 (1882), is still that which guides the Courts in the matter.

Bills of Costs in the High Court of Justice and Court of Appeal, in the House of Lords and the Privy Council, &c. By HORACE MAXWELL JOHNSON. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1897. La. 8vo. xxxii and 908 pp. (32*s.*)

THE subject of costs is an interesting one to some people—those who have to receive or pay them. A taxing-master also may possibly consider the subject as anything but dull, and may be able to educate those about him in

such a way that they come to consider costs an absorbing and exciting study. The author of the book under review is a barrister, and barristers, as a rule, do not know or care to learn much about solicitors' bills, but Mr. Johnson is the son of a taxing-master, and the fact that his father has supervised the whole work should be a guarantee that the bills of costs set out will stand the fire of taxation. If Master Johnson ever takes an objection to any item in one of those bills the book will surely be an authority weighty enough to crush even him. The reviewer, who belongs to that branch of the profession which is paid by fees and not by costs, does not pretend to know whether the bills are such as would probably be allowed, but he has been told by an official of experience that those relating to the winding up of companies are 'all right.' The title given above is not all that appears on the title-page. The solicitor to a petitioner may ascertain how much he is likely to get, whether the petition is to wind up a company or dissolve a marriage, and information is afforded not only to the lawyer who has charge of an election petition or a parliamentary inquiry, but to the humble practitioner in the County Court and the Mayor's Courts. Even conveyancing costs are dealt with. The book does not consist entirely of bills of costs; it contains also the rules and orders governing the different tribunals with reference to this important subject, and also a selection of cases. The pages would be rather more lively reading if case-law appeared more frequently, but they are meant principally for the use of those who have to draft bills of costs, and to those people the law reports are possibly as heavy reading as the perusal of bills of costs is to most persons other than those who are mentioned in the first part of these observations.

An Outline of the Law of Libel. Six Lectures delivered in the Middle Temple Hall during Michaelmas Term, 1896. By W. Blake Odgers. London: Macmillan & Co. 1897. Sm. 8vo. viii and 230 pp.

Working lawyers look with suspicion on abridgments of standard works. But it is quite another thing when Mr. Blake Odgers himself gives us the cream of his well-known Digest in a compendious, readable, and even amusing form. He professes to deal exclusively with libel, but he has really done something better; he has covered the whole law of defamation so far as it is equally applicable to libel and slander. The little book may be safely and cordially recommended to the public, to students, and to practitioners who want to refresh their memory without having the whole of the authorities set before them. And now there is another work we want Mr. Blake Odgers to undertake: a critical history of the law of defamation from its first appearance in our books. It ought to be done, and no other man could do it so thoroughly. Some of the questions to be cleared up are the following. How did the action on the case for defamation get assimilated in material points to an action of trespass? Would the omission of the word 'falsely' ever have been fatal to the declaration? When and why was it first settled that the plaintiff need not prove the falsehood of the libel in the first instance? Why is it that fair comment is no libel at all, while a defamatory statement true in substance and fact is a justified libel, in the same way that entry under authority of law is not a simply lawful act but a justified trespass, as shown by the doctrine of trespass *ab initio*? Such things cannot be adequately handled in ordinary text-books, but there is both curiosity and profit in them.

A Concise Treatise on Mortgages, Pledges, and Liens. By WALTER ASHBURNER. London: William Clowes & Sons, Lim. 1897. 8vo. liv and 624 pp.

THIS is really a good book. It discusses mortgages, legal and equitable, pledges, common law liens, equitable charges and liens, liens created by statute and maritime securities. In general arrangement the book resembles Theobald on Wills. It does not contain any discussion of the theory of the law or of the principles on which the law is founded. The author has collected the cases under appropriate heads, and has stated the effect of each case tersely and accurately in a form which readily catches the eye. We feel certain that the book will be found very useful to the busy practitioner, and we venture to predict that it will have a large sale.

Le Droit International théorique et pratique. Par M. CHARLES CALVO. Fifth Edition. Tome vi. (Supplément Général). Paris: Arthur Rousseau. 1896. lviii and 595 pp.

M. CALVO completed the publication of the five volumes composing the body of his exhaustive work in 1888. The present volume is intended to bring them down to date. This he does by summarizing events and authorized opinions and utterances since 1888, which in any way can be useful to the international jurist. The book has no pretensions beyond this, and any criticism of it as literature would be misplaced. It is a compilation for reference, and as such indispensable, though we should have liked to see more pains expended on the correction of both the text and the index. The latter especially is neither quite accurate nor sufficiently full. A careful collection of classified facts and authorities without any effort otherwise to connect them, as in the present volume, is much wanted.

We have also received:—

Bullen and Leake's Precedents of Pleadings, with notes and rules relating to Pleading. Fifth Edition. By THOMAS J. BULLEN, CYRIL DODD, Q.C., and CHARLES WALTER CLIFFORD. London: Stevens & Sons, Lim. 1897. 8vo. lxxiii and 1126 pp. (38*s.*)—'Bullen and Leake' has reverted to its original form of a one-volume work. We think this is a step in the right direction. A bulky book may not be convenient; but even bulk is less inconvenient than a book in two volumes published at different intervals, and each volume brought down to a different stage in the manufacture of new Rules. The original notes have for the most part been preserved and brought down to date.

English Statute Law Revised, being an analysis of the effect of the Legislation of 1896 upon earlier statutes relating to England. By PAUL STRICKLAND. London: W. Clowes & Sons, Lim. 1897. 8vo. 46 pp. (2*s.* 6*d.*)—We welcomed this little book on its first appearance last year (L. Q. R. xii. 296). To those compelled to dive into the statute law it will save much time and labour. Special attention is given to partial repeals and variations.

The Conveyancing Acts, &c., by AUBREY ST. JOHN CLERKE and THOMAS BRETT. Fourth Edition by AUBREY ST. JOHN CLERKE. London: Butterworth & Co. 1897. 8vo. li and 296 pp. (index not paged). (10*s.* 6*d.*)—The

passing of the Conveyancing Act, 1892, and the Trustee Act, 1893, have led to substantial alterations and additions to this edition of 'Clerke and Brett.' Some improvements in arrangement have been effected, and the sections of the Conveyancing Acts repealed by the Trustee Act, 1893, are printed in italics. This is convenient and avoids confusion.

Encyclopaedia of the Laws of England. Under the general editorship of A. Wood Renton. Vol. II. Banner to Cheque. London: Sweet & Maxwell, Lim. Edinburgh: W. Green & Sons. La. 8vo. viii and 505 pp. (20*s.* net.) —Among the more important titles in this volume are 'Bills of Exchange' and 'Carrier,' by Mr. Kerly; 'Bills of Lading,' and 'Charter-Party,' by Sir W. G. F. Phillimore and Mr. G. G. Phillimore; 'Bills of Sale,' by Mr. J. Weir; 'Building Contracts,' by Mr. A. A. Hudson; 'Building Societies,' by Mr. Wurtzburg; 'Bill of Rights,' by Sir W. R. Anson; 'The Cabinet,' by Mr. J. P. Wallis; 'Canon Law,' by Mr. F. W. Maitland; and 'Charities,' by Mr. A. D. Tyssen. Mr. Raleigh writes on several British Colonies and Mr. Barclay on various points of international law.

Monopolies by Patents, and the Statutable Remedies available to the Public. By J. W. Gordon. London: Stevens & Sons, Lim. 1897. 8vo. xxxvi and 300 pp. (18*s.*)—This is an interesting book. It contains, among other things, the text of the Statute of Monopolies with very full annotations: a chapter on the 32nd section of the Patents Act, 1883; a report of the Case of Monopolies; a facsimile reprint from the British Museum copy of 'A Declaration of His Maiesties Royall pleasure . . in matter of Bountie,' printed in 1610, which, as Mr. Gordon shows (p. 157), contains the substance of and was the main reason for passing the Statute of Monopolies thirteen years later. Mr. Gordon points out one curious fact in connexion with the statute, namely, that there is no record of a litigant having ever taken advantage of the elaborate provisions of section 4 of the Act. The book also contains a form of a seventeenth century Patent granted to one John Gilbert for 'a certain new engine or instrument called or termed a water plough.' Those interested in curious forms of Patent Grant will find many such in Mr. Hulme's article in L. Q. R. xii. 141.

The Revised Reports. Edited by Sir F. Pollock, assisted by R. Campbell and O. A. Saunders. Vol. XXIX. 1825–1830. (5 Russell; 2 Simons; 5 Barn. & Cress.; 7 & 8 Dowl. & Ryland; 4 Bingham; 12 Moore; 1 Moore & Payne; McCleland & Younge.) London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1897. La. 8vo. xviii and 869 pp. (25*s.*)—The Preface endeavours to lighten the difficulties felt by many students of the law of contract about the one-sided operation of covenants by deed as laid down in *Doe* d. *Garnons* v. *Knight* (reprinted in this volume), and confirmed by the House of Lords in *Xenos* v. *Wickham*.

The Law and Practice of Letters Patent for Inventions. By Lewis Edmunds, Q.C. Second Edition by T. M. Stevens. London: Stevens & Sons, Lim. 1897. La. 8vo. lvii and 943 pp. (32*s.*)—We spoke favourably of this book on its first appearance in 1890. The fact that a new edition is now called for shows that the profession also appreciates the merits of the work.

The Yearly Abridgment of Reports, 1896. By Arthur Turnour Murray. London: Butterworth & Co. 1897. La. 8vo. lxi and 373 pp. (15*s.*)—This work is a new departure in annual legal literature. In the body of the book the cases are arranged alphabetically, but there is a subject

index—much like an index to a text-book—at the end of the work. As the editor puts it, the book 'is not a mere compilation of existing head-notes, but consists of an analysis—the result of a careful perusal by the editor himself—of every reported case'; lists of cases cited, statutes, and names of defendants complete what appears to be a thorough piece of work.

Ruling Cases. Arranged, annotated and edited by R. CAMPBELL. With American notes by IRVING BROWNE. Vol. XI. Estoppel—Execution. London: Stevens & Sons, Lim. Boston, Mass.: Boston Book Co. 1897. La. 8vo. xxxvi and 701 pp. (28*s.*)

Ruling Cases. Index to Vols. I–X, Addenda from 1894 to 1896 inclusive, by R. CAMPBELL. With Complete Table of Cases, a General Index of Subjects, and a Preface by EDWARD MANSON. London: Stevens & Sons, Lim. 1897. La. 8vo. viii and 420 pp. (20*s.*)

A Treatise on the Law of Guarantees and of Principal and Surety. By H. A. DE COLYAR. Third Edition. London: Butterworth & Co. 1897. 8vo. xliv and 470 pp.

Principles and Practice of the Law of Libel and Slander. By HUGH FRASER. Second Edition. London: W. Clowes & Sons, Lim. 1897. 8vo. xxxviii and 312 pp. (12*s.* 6*d.*)

A Summary of the Principles of the Law of Simple Contracts. By CLAUDE C. M. PLUMPTRE. Second Edition. London: Butterworth & Co. 1897. 8vo. xix and 271 pp.

The Law of Motor Cars, Hackney and other Carriages. By G. A. BONNER. London: Stevens & Sons, Lim. 1897. 8vo. xii and 252 pp. (7*s.* 6*d.*)

The Law relating to Fraudulent Conveyances. By A. J. HUNT. Second Edition by WILLIAM CONNELL PRANCE. London: Butterworth & Co. 1897. 8vo. xliii and 294 pp. (9*s.*)

Hints on Advocacy. By RICHARD HARRIS, Q.C. Eleventh Edition. London: Stevens & Sons, Lim. 8vo. xvii and 356 pp. (7*s.* 6*d.*)

The Law relating to Civil Engineers, Architects and Contractors, with a chapter on Arbitrations. By L. LIVINGSTON MACASSEY and J. ANDREW STRAHAN. Second Edition. London: Stevens & Sons, Lim. 1897. 8vo. xvi and 352 pp. (12*s.* 6*d.*)

Tratado de derecho administrativo según las teorías filosóficas y la legislación positiva. Por ADOLFO POSADA. Madrid: Victoriano Suárez. 1897. 8vo. Vol. I. xxiii and 514 pp. (apparently all yet published).

A Treatise on the Modern Law of Contracts. By C. F. BEACH, Jr. Two volumes. London: Wm. Clowes & Sons, Lim. 1897. La. 8vo. cxcv, xxv and 2614 pp. (£3 5*s.*)

A Treatise on the Law relating to Bankers and Banking Companies. By the late JAMES GRANT. Fifth edition by CLAUDE C. M. PLUMPTRE and J. K. MACKAY. London: Butterworth & Co. 1897. 8vo. lxxii and 810 pp. (29*s.* 6*d.*)

The Historical Development of Code Pleading in England and America. By C. M. HEPBURN. Cincinnati: W. H. Anderson & Co. 1897. La. 8vo. xvi and 318 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
